TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1312. 879

MILO HOADLEY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 20, 1886.

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II.

The possession of said parcels of land is and has been in this complainant from the year 1850 down to the time of the commencement of this action.

III.

That said parcels of land are situated west of Larkin street, within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of the State of California on the 15th day of April, 1851, hereinafter referred to.

IV.

That on and before the 1st day of January, A. D. 1855, plaintiff was, and ever since has been down to the time of the commencement of this suit, in the actual possession of the above-described premises, occupying and claiming the same in his own right as the owner thereof adversely to the claim of the late city of San Francisco and to the defendant herein, the successor to said city, and to all others.

V.

That at and prior to the acquisition of the territory of California by the United States from Mexico, in the year 1848, by the treaty of Guadalupe Hidalgo, there was existing at the place afterwards called the city of San Francisco a town or pueblo, claiming title in her corporate capacity to four square leagues of land, including the land herein described, which town or pueblo continued till after the organization of the State of California and until the incorporation of the city of San Francisco, as hereinafter stated.

VI.

That afterwards the Legislature of California passed an act entitled "An act to incorporate the city of San Francisco," approved April 15th, 1850, whereby the inhabitants of the city of San Francisco, including those within the former pueblo limits, were constituted a body politic and corporate, in fact and in law, by the name and style of the "city of San Francisco," and the legislative power of said city was, by said act, vested in a mayor and a common council, consisting of a board of aldermen and a board of assistant aldermen.

VII.

That afterwards the Legislature of the State of California passed another act, approved April 15th, 1851, entitled "An act to reincorporate the city of San Francisco," whereby the act last before named was repealed, and the people of the city of San Francisco within certain limits hereinafter specified, including those within said pueblo limits and within said first incorporation, were continued and organized as a body politic and corporate

under the name and style of the "city of San Francisco," with power of perpetual succession, and with power expressly given by said charter to purchase, receive, and hold property, real and personal, and to sell or otherwise dispose of the same for their common benefit.

VIII.

That by the said act of reincorporation the legislative power of said city was vested in a mayor and a board of aldermen and a board of assistant aldermen, composing the common council of said city.

IX.

That afterwards the Legislature of the State of California passed an act entitled "An act to reincorporate the city of San Francisco," approved May 5th, 1855, which went into effect on the first Monday of July, 1855.

X.

That by the act last named the corporation known as the city of San Francisco, organized under said act of 1851, was continued as a body politic and corporate, in name and in fact, by the name and style of "the city of San Francisco," with the right of per-
8 petual succession by that name, and with the right and power to purchase, receive, hold, and enjoy real and personal property, and to sell and convey, mortgage, and dispose of the same for the common benefit; that said act of incorporation gave said common council power also to "confirm, dispose of, and make all needful rules and regulations respecting the title to lands or other property of the city."

XI.

That in and by said act of incorporation the legislative power of said city was vested in a mayor and a board of aldermen, and a board of assistant aldermen, composing the common council of said city.

XII.

That afterwards the Legislature of the State of California passed an act entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Erancisco, and to consolidate the government thereof," approved April 19th, 1856.

XIII.

That by the act last named the former charters were repealed, and the said city of San Francisco was continued a body politic and corporate in name and in fact by the name of the city and
9 county of San Francisco, with perpetual succession, and all the rights and property of said city of San Francisco were by

said act vested in said city and county of San Francisco (the defendant herein), organized and incorporated by the act last named; and said city and county was made the legal successor to the rights, duties, and liabilities of said city of San Francisco.

XIV.

That the act last named is commonly known and called "the consolidation act;" that the legislative power of said corporation under said consolidation act was vested in a board of supervisors and a president of the board of supervisors.

XV.

That said consolidation act took effect July 1st, 1856, and the same still continues in full force and operation.

XVI.

That by subsequent legislation the name and title of the presiding officer of said board of supervisors and chief executive officer of said city and county of San Francisco was changed from that of "president of the board of supervisors" to that of mayor.

XVII.

That the parcels of land herein mentioned as the subject
10 of this action are situated within the limits of the former pueblo and within the corporate limits defined in each and all of the acts of incorporation herein mentioned, and they are a part of the four square leagues of land claimed by said pueblo and afterwards claimed and petitioned for by and confirmed to said city, as hereinafter stated.

XVIII.

That on the 2d day of July, 1852, the city of San Francisco, then organized as a corporation under said act of May 15th, 1851, presented her claim as successor to said pueblo and petition for confirmation to four square leagues of land, including the land herein mentioned, to the board of commissioners, organized and acting under the act of Congress entitled "An act to ascertain and settle private land claims in the State of California," approved March 3d, 1851, which claim was confirmed by said commissioners; and afterwards, on the 18th of May, 1865, said claim was finally confirmed by the decree of the circuit court of the United States for the district of California, to which court said claim and petition had been transferred by law.

XIX.

That said final decree of confirmation was for four square leagues
of land, by description including the premises in controversy,
11 and the said decree in terms declared that "this confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority."

XX.

That the common council of said city of San Francisco passed an ordinance, number 822, entitled "An ordinance for the settlement and granting of the land titles in the city of San Francisco," which was approved by the mayor of said city of San Francisco, June 20, 1855, wherein by the first and second sections thereof it is ordained as follows:

"SECTION 1. It shall be the duty of the mayor to enter at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the Bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests.

"SEC. 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the cor-
12 porate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, and to their heirs and assigns forever" (with certain exceptions therein specified).

XXI.

The premises first hereinabove described are a part of the land so relinquished and granted to the possessors, and not within any of the exceptions in said ordinance.

XXII.

That said ordinance 822 contained the following further provisions, viz:

"SEC. 3. The patent issued or any grant made by the United States to the city shall enure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section (meaning said sec. 2), 'as fully and effectually to all intents and purposes as if it were issued or made directly to them individually and by name.'"

And said ordinance further provided, in section 5 thereof, that the city should have the right to lay out and open streets through the granted premises, whenever the city deemed it expedient, without expense to the city, at the entire expense of the adjacent property; and, further, by section 6 thereof, that said city might lay out
13 and reserve upon the said lands public squares which shall not embrace more than one block corresponding in size to the adjoining blocks, and that the selections shall be made within six months from the passage of this ordinance, and that the city shall not, without due compensation, occupy for all municipal and public purposes, after laying out the streets, more than one-twentieth part of the land in possession of any one person. Said selections were, by the terms of section 8 of said ordinance 822, to be made by

a commission to consist of three persons, to be chosen by the common council, "who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart respectively;" and also the further provision, in section 11 thereof, that nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim, now pending before the United States land commission for Pueblo lands, for the several use, benefit, and behoof of the said possessors mentioned in section 2 as to the lands by them so possessed, and for the
14 proper use, benefit, and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

Plaintiff never made, executed, or acknowledged any deed of release or conveyance to the said corporation for any of the lands selected by said commission, nor for any of the lands herein referred to; nor was any deed of release ever asked or demanded of plaintiff by said corporations or either of them; nor was any compensation ever paid, tendered, or offered to him for any of said land; nor for any excess so selected by said commission over the one-twentieth of said land in his possession.

XXIII.

That at the time said ordinance 822 was passed and approved as aforesaid the common council of said city was organized and acting under and by authority of said charter of 1851; that is to say, the said act of the Legislature of the State of California entitled "An act to reincorporate the city of San Francisco," approved April 15th, 1851.

XXIV.

That under and by the terms of the act last named the said common council had full power and authority to pass said ordinance 822, and the mayor had full power and authority to approve
15 the same, and the said ordinance when so passed and approved as aforesaid became and was a legal and valid ordinance, and vested all the title of said city to said land in plaintiff, who was the actual possessor thereof all the time from January 1st, 1855, up to the time of the introduction of said ordinance in the said common council and down to the commencement of this action.

XXV.

No selections were made of any lots or squares by said commission nor by said city for public uses within six months from the passage of said ordinance 822.

XXVI.

That afterwards the common council of the city of San Francisco passed another ordinance, number 845, entitled "Ordinance provid-

ing for selecting and designating public squares and reservations for hospitals, fire-engines, and school purposes, and for adopting the plan of streets in the western and southwestern portions of the city, according to the provisions of ordinance 822," which was approved by the mayor of said city September 27th, 1855, wherein and whereby the said city, through its common council, did ordain and enact as follows, in section one thereof: That "the board of aldermen and the board of assistant aldermen shall meet in joint con-
16 vention at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section 8 of said ordinance number 822."

"SECTION 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners, and with their concurrence, to furnish, by way of recommendation, to the common council, within one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the city limits west of Larkin and southwest of Johnston streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city, under the provisions of the aforesaid ordinance number 822."

"SEC. 3. The said ordinance number 822, referred to in the preceding section 1, is hereby reordained, ratified, and confirmed in all its parts."

XXVII.

That afterwards, to wit, November 12th, 1855, said board of aldermen and board of assistant aldermen met in joint convention and selected three commissioners, as provided in said ordinances 822 and 845.

17 XXVIII.

That afterwards the city surveyor, acting in conjunction with said commissioners so selected, and with their concurrence, did make and furnish, by way of recommendation, to the common council the map or plan of the city hereinafter mentioned; but said map or plan was not made or presented to the common council until April 19th, 1856.

XXIX.

That in making said map said commissioners violated their instructions, powers, and duties, as defined in said ordinances 822 and 845, in this, among other things: That upon said map they laid out six squares or plazas, each embracing four blocks instead of a single block in size, corresponding with the adjoining blocks, as provided in section 6 of ordinance 822; one of which squares of four blocks the said commissioners designated on said map as "Alta plaza," including the parcel of plaintiff's land first above described, and another of said squares, embracing four blocks, said commissioners designated on said map as "Hamilton square," including the parcel of plaintiff's land secondly above described.

XXX.

That said commissioners reported said map, with their said
18 selections thereon designated (so made by them in disregard of their power and instructions), to the common council, their constituents, for approval April 19, 1856, and not before, and said common council never did approve said map or plan, but refused to approve the same.

XXXI.

That no selection of land for public or municipal purposes was made by said city or by said commission from the lands mentioned in said ordinance 822 within six months after the passage of said ordinance 822, nor did said commissioners make or report said map, or any map or plan or selections, to the common council for its approval for more than six months after their appointment, and not until the 19th day of April, 1856.

XXXII.

That the said land of plaintiff so included in said squares was more than one-twentieth and more than a tenth of the whole of the land in his possession mentioned in said ordinance 822 after laying out the streets through the same by the city and now existing, and no compensation has been made, offered, or tendered to plaintiff for any land nor for said excess over one-twentieth.

XXXIII.

That said common council which passed said ordinance 845
19 was organized and acting under the charter of 1855, so called; that is to say, under said act of the Legislature of the State of California entitled "An act to reincorporate the city of San Francisco," approved May 5, 1855, which act went into effect on the first Monday in July, 1855.

XXXIV.

That under and by virtue of the act last named said common council had full power and authority to pass said ordinance 845, and the mayor had full power and authority to approve the same; and the said ordinance when so passed and approved as aforesaid became effective and was a legal and valid ordinance and confirmed the said ordinance 822, and gave all the title of said city in said parcels of land to plaintiff.

XXXV.

That on the 16th day of October, 1856, the board of supervisors of the city and county of San Francisco (organized and acting under said consolidation act of 1856) passed an order, of which the following is a copy, whereby they did ordain—

"That the plan or map of the western addition reported by the commission created under an ordinance of the last common council

of the city of San Francisco be adopted by this board, and
20 be declared to be the plan of the city in respect to the location of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets."

That the map or plan referred to in said order is the same map made by said commission and reported to the common council, as above stated, April 19, 1856.

XXXVI.

That afterwards, to wit, March 11th, 1858, the Legislature of the State of California passed an act entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," which act was approved at the date last named.

XXXVII.

That in and by said act the above-mentioned ordinances 822 and 845 of said common council, and also the said order of the said board of supervisors last above recited, are set out and recited at length, and afterwards said act contains the following enactment ratifying and confirming the same, in words and figures following:

"Be it therefore enacted, That the within and before recited order and ordinances be, and the same are hereby, ratified and con-
21 firmed, and all the land entered or to be entered in the United States land office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests in execution of the trust designated in an act of Congress entitled 'An act for the relief of citizens of towns upon the public lands of the United States under certain circumstances,' approved May 23rd, one thousand eight hundred and forty-four, as extended and applied by an act of Congress entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' approved March 3d, one thousand eight hundred and fifty-three, and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually to all intents and purposes as if they were public acts of the State Legislature."

"SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinances first above recited" (meaning said ordinance 822) "shall take effect as fully and completely, for the pur-
22 pose of transferring the city's interest and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name, and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title,

rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true *interest* and meaning thereof."

XXXVIII.

The said ordinances 822 and 845 and the said order of said board of supervisors herein above referred to are the same as those set forth and recited in the above-mentioned act of the Legislature of the State of California and as printed and published in the Public Acts of the Legislature of the said State (at pages 52, 53, 54, 55, and 56 for the year 1858), and the said ordinances and order and said act ratifying the same are now hereby referred to for greater certainty and made a part of this amended complaint.

XXXIX.

That afterwards the Congress of the United States, pending the city's said petition for confirmation, passed an act, approved July 1st, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California," wherein, and by the fifth
23 section thereof, it was enacted "That all the right and title of the United States to the lands within the limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of the State of California on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinances of said city ratified by an act of the Legislature of said State, approved on the 11th of March, 1858, entitled 'An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of the city,'" with certain exceptions therein mentioned.

XL.

The premises herein described, the subject of this suit, are within and a part of the land relinquished and granted by said act of Congress, as therein mentioned, and not within or any part of any of the exceptions mentioned in said act of Congress.

XLI.

That, by virtue of the grant to the said city and its successors in said act of Congress, and of the grant and confirmation by said city to the possessors in said ordinances, and of the possession of
24 said land by plaintiff as aforesaid and of said decree of confirmation by said circuit court, plaintiff has become and now is the owner, seized in fee-simple absolute, of the parcels of land above described.

XLII.

That said order passed by the board of supervisors of said city and county October 16, 1856, above mentioned originally, when passed or when confirmed by the Legislature as aforesaid, had no

other purpose or effect than to adopt a then existing plan or map of said city—that is to say, the said map made and reported by said commission—and did not (as the defendant falsely pretends) relate to or effect the title to any land outside of the streets thereon delineated, nor does it in any manner impair, modify, or repeal said ordinances or either of them, nor the grants thereby made, or divest plaintiff's title to the above-described premises granted to him by said ordinances, but said order left the said ordinances and the grant to plaintiff therein in full force and operation in all their parts.

XLIII.

That the defendant herein, contriving to annoy and injure plaintiff and to cast a cloud upon his title to said land, falsely and unjustly pretends that plaintiff is not the owner nor entitled to
25 the possession of said premises, but that defendant is the owner, and that defendant has the right to, the possession thereof for the purpose of public parks or squares.

XLIV.

That by the means herein mentioned, and not otherwise, plaintiff's lands herein described falsely and improperly appear on said map as within and a portion of said squares falsely called public squares, but none of said land was ever in fact in the use, occupation, or possession of defendant, nor of the public; but, on the contrary, the same has been in the continuous and exclusive use and occupation of plaintiff, claiming the same in his own right from the year 1850 down to the time of the commencement of this action.

XLV.

That upon the facts above stated, and with no other right or title thereto, defendant falsely claims and pretends that said land is not the property of plaintiff, and that said act of Congress of 1864 gave plaintiff no title thereto, but that the same is in and a part of the public parks of said city and dedicated to public use, and that plaintiff is an intruder thereon, whereby purchasers of real estate are misled and falsely made to believe that the plaintiff has no title to said land, but that the same is a part of the said squares falsely by
26 defendant called public squares, and that plaintiff is but an intruder thereon.

XLVI.

That by reason of the grant of the lands in said ordinances and in said act of Congress, being to the possessors as a class, without naming them, the title of plaintiff to said premises, though in fact good, depends upon various acts *in pais* to establish his possession and title to said land, of which acts of possession there was no record, by reason whereof the aforesaid false and groundless pretensions of defendant in claiming said land and in allowing it to stand on said map, appearing as a part of said so-called public squares, casts a

cloud and distrust upon plaintiff's title thereto, so that it has become unmarketable, and plaintiff cannot sell or dispose of the same in any manner for one-half its real value; all of which actings, doings, and pretensions are contrary to equity and good conscience, and tend to manifest wrong and injury to plaintiff in the premises.

XLVII.

That said land above described, the subject of this action, is of the value of twenty thousand dollars and upwards.

XLVIII.

Plaintiff further avers that defendant has not had, nor has
27 any predecessor in interest of defendant held or had, the possession of the property in dispute herein at any time within five years nor within ten years prior to the commencement of this action; but, on the contrary, plaintiff for more than nineteen years immediately prior to the commencement of this action has been in the actual, *bona fide*, uninterrupted, and continuous possession of said property hereinbefore described, claiming the same adversely to the defendant and against the predecessors in interest of defendant and against the whole world; and that the defendant should not be permitted to set up any claim in or to said property, because any and all claims which the defendant may have or pretend to have in or to said property is barred by the statute of limitations of the State of California, and by section 319 of the code of civil procedure of the State of California. The defendant made no demand nor commenced any suit against plaintiff for said land, though he held and possessed the same adversely to defendant and said city, the predecessor of defendant, for more than fourteen years after the passage of said ordinance 822, and for more than five years after said act of Congress prior to the commencement of this action, with full knowledge on the part of defendant and said city of plaintiff's possession and adverse claim to said land, whereby defendant abandoned
28 all right to said land, and should be estopped in equity from now setting up any right or title thereto or to the possession thereof.

XLIX.

And forasmuch as plaintiff can only have adequate or proper relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, plaintiff prays that it may be herein ordered, adjudged, and decreed that plaintiff was at the time of the commencement of this action, and that he still is, the true and lawful owner, seized and possessed of all and singular the above-described parcels of land, and every part thereof, and that the defendant has no right, title, or interest therein, and that the said lands are no part of any public square, park, or plaza, and that the defendant has no right, power, or authority to claim or designate them as such upon said map or otherwise, and that they never were dedicated to public use, and that the defendant be forever en-

joined and restrained from asserting any right or title therein or thereto as against plaintiff, either for the purpose of a public square or otherwise, and for such other or further order, decree, or relief in the premises as may be just.

San Francisco, Cal., October 15th, 1878.

S. W. HOLLADAY,
Attorney for Plaintiff.

29 Endorsed: Filed Oct. 15th, 1878. Thos. H. Reynolds, clerk, by P. Deveny, deputy clerk.

Due service of the within amended complaint is hereby admitted this 15th day of October, 1878.

W. C. BURNETT,
Attorney for Defendant.

Answer.

(Title of court and cause.)

Now comes the defendant in said cause, The City and County of San Francisco, by W. C. Burnett, her attorney, and makes answer to the amended complaint, which was filed therein on the 15th day of October, A. D. 1878.

1. Denies that at the time of the commencement of this action plaintiff was, at any other time has been or is, the owner in fee-simple absolute, or otherwise, or in the possession of the parcels of land described in such amended complaint, or either of them, or any part thereof.

2. Denies that the possesssion of said parcels of land, or of either of them, or of any part thereof, is or has been in the complainant or plaintiff from the year 1850 down to the time of the commencement of this action, or during any part of that time or at any other time.

30 3. Admits and alleges that said parcels of land are situated west of Larkin street, within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of the State of California on the 15th day of April, 1851, referred to in said amended complaint.

4. Denies that on or before the first day of January, A. D. 1855, or at any other time, plaintiff was, or ever since or at any time has been, or down to the time of commencement of this suit, in the actual possession of said premises, or of any part thereof, or occupying or claiming the same in his own right as the owner thereof, or adversely to the claim of the late city of San Francisco, or to the defendant herein, the successor to said city, or to all, or to any others.

5. Admits and alleges that at and prior to the acquisition of the Territory to California by the United States from Mexico, in the year 1848, by the treaty of Guadalupe Hidalgo, there was existing at the place afterwards called the city of San Francisco a town or pueblo, claiming title in her corporate capacity to four square leagues of land, including the land herein described, which town or pueblo continued

till after the organization of the State of California, and until the incorporation of the city of San Francisco, as hereinafter stated.

31 6. Admits and alleges that afterwards the Legislature of California passed an act entitled "An act to incorporate the city of San Francisco," approved April 15, 1850, whereby the inhabitants of the city of San Francisco, including those within the former pueblo limits, were constituted a body politic and corporate in fact and in law, by the name and style of the "City of San Francisco," and the legislative power of said city was by said act vested in a mayor and a common council, consisting of a board of aldermen and a board of assistant aldermen.

7. Admits and alleges that afterwards the Legislature of the State of California passed another act, approved April 15, 1851, entitled "An act to reincorporate the city of San Francisco," whereby the act last before named was repealed, and the people of the city of San Francisco, within certain limits in said amended complaint specified, including those within said pueblo limits and within said first incorporation, were continued and organized as a body politic and corporate under the name and style of "The City of San Francisco," with power of perpetual succession and with power expressly given by said charter to purchase, receive, and hold property, real or personal; but denies that the city of San Francisco had power to sell or otherwise dispose of the same for their common benefit.

32 8. Admits and alleges that by the said act of reincorporation the legislative power of said city was vested in a mayor and a board of aldermen and a board of assistant aldermen, comprising the common council of said city.

9. Admits and alleges that afterwards the Legislature of the State of California passed an act entitled "An act to reincorporate the city of San Francisco," approved May 5, 1855, which went into effect on the first Monday of July, 1855.

10. Admits and alleges that by the act last named the corporation known as the city of San Francisco, organized under said act of 1851, was continued as a body politic and corporate in name and in fact by the name and style of "The City of San Francisco," with the right of perpetual succession by that name, and with the right and power to purchase, receive, hold, and enjoy real and personal property; but denies that she had power to sell, or convey, or mortgage, or dispose of the same for the common benefit otherwise than by dedicating or devoting the same directly to public uses, or that said act of incorporation gave said common council power to confirm, or to dispose of, or to make all or any needful rules or regulations respecting the title to lands or other property of the city.

33 11. Admits and alleges that in and by said act of incorporation the legislative power of said city was vested in a mayor and a board of aldermen and a board of assistant aldermen, composing the common council of said city.

12. Admits and alleges that afterwards the Legislature of the State of California passed an act entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of

the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856.

13. Admits and alleges that by the act last named the former charters were repealed, and the said city of San Francisco was continued a body politic and corporate in name and in fact by the name of the city and county of San Francisco, with perpetual succession, and all the rights and property of said city of San Francisco were by said act vested in said city and county of San Francisco (the defendant herein), organized and incorporated by the act last named, and said city and county was made the legal successor to the rights, duties, and liabilities of said city of San Francisco; but alleges that such rights, duties, and liabilities were only such as from time to time — established by the charter of said city and county and the amendments thereto.

34 14. Admits and alleges that the act last named is commonly known and called "the consolidation act;" that the legislative power of said corporation under said consolidation act was vested in a board of supervisors and a president of the board of supervisors.

15. Admits and alleges that said consolidation act took effect July 1, 1856, and the same still continues in full force and operation, but alleges that the provisions thereof are controlled by subsequent legislation by the Legislature of this State to the extent that the same is inconsistent therewith.

16. Admits and alleges that by subsequent legislation the name and title of the presiding officer of said board of supervisors and chief executive officer of said city and county of San Francisco was changed from that of "president of the board of supervisors" to that of mayor.

17. Admits and alleges that the parcels of land in said amended complaint mentioned as the subject of this action are situated within the limits of the former pueblo and within the corporate limits defined in each and all of the acts of incorporation herein mentioned, and they are a part of the four square leagues of land claimed by said pueblo, and afterwards claimed and petitioned for by and confirmed to said city, as hereinafter stated.

35 18. Admits and alleges that on the 2d day of July, 1852, the city of San Francisco, then organized as a corporation under said act of May 15, 1851, presented her claim as successor to said pueblo and petition for confirmation to four square leagues of land, including the land herein mentioned, to the board of commissioners organized and acting under the act of Congress entitled "An act to ascertain and settle private land claims in the State of California," approved March 3, 1851, which claim was confirmed by said commissioners; and afterwards, on the 18th of May, 1865, said claim was finally confirmed by the decree of the circuit court of the United States for the district of California, to which court said claim and petition had been transferred by law.

19. Admits and alleges that said final decree of confimation was for four square leagues of land, by description including the prem-

ises in controversy, and the said decree in terms declared that "this confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city."

20. Admits and alleges that the common council of said city of San Francisco passed an ordinance number 822, entitled "An
36 ordinance for the settlement and quieting of the land titles in the city of San Francisco," which was approved by the mayor of said city of San Francisco June 20, 1855, a true copy of section 1 whereof and of a portion only of section 2 whereof is set forth in the 20th subdivision of said amended complaint, and for convenience, and that there may be no misapprehension or applying of wrong conclusions as to the meaning of any portion thereof, defendant sets forth a full, true, and correct copy of such ordinance and of ordinance 845, and of the order or ordinance adopted by the justices of the peace acting as a board of supervisors, and of the act of the Legislature of this State confirmatory thereof entitled "An act concerning the city of San Francisco, and to ratify and confirm 'certain ordinances of the common council of said city,'" approved March 11, 1858, marked Exhibit A, attached hereto and made part hereof.

21. Denies that the premises first in said amended complaint described, or any part thereof, or any premises described in said amended complaint, are or ever were a part of the land so relinquished or granted to the possessors or not within any of the exceptions in said ordinance.

22. Admits and alleges that section 3 of ordinance 822
37 aforesaid is in the words and figures as set forth by copy in subdivision number 22 of such amended complaint.

Denies that said ordinance further provided in section 5 thereof that the city should have the right to lay out and open streets through the granted premises whenever the city deemed it expedient, without expense to the city, at the entire expense of the adjacent property, but alleges that the provision of said section 5 upon that subject was that "The city shall have the right to proceed to lay out and open streets as soon as the corporation may deem it expedient in that part of the city west of Larkin street and southwest of Johnston street, and reserve the right to take possession of such lands as it may deem necessary to occupy for that purpose without compensation, and to assess, in the manner provided by the present or any existing charter of the city, upon the lands bounded on such streets the whole expense of laying out, opening, grading, and constructing the same, and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance." And defendant alleges that, with respect to all public reservations within the limits of said lands mentioned in said ordinance, the city of
38 San Francisco was and is to bear and pay a share of the costs of all street work in proportion to frontage.

Denies that by section 6 of said ordinance it was provided that said city might lay out or reserve upon said lands public squares which should not embrace more than one block, corresponding in size to the adjoining blocks, or that the selections should be made within six (6) months from the passage of said ordinance, or that the city should not without due compensation occupy for all municipal and public purposes, after laying out the streets, more than one-twentieth part of the land in possession of any one person.

Denies that said selections were, by the terms of section 8 of said ordinance 822, to be made by commission, to consist of three persons to be chosen by the common council, "who shall report the same to the common council for its approval, and upon such approval deeds of release to the corporation for the lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart respectively."

Admits and alleges that plaintiff never made, executed, or
39 acknowledged any deed, or release, or conveyance to the said corporation for any of the lands selected by said commission, nor for any of the land in said amended complaint referred to; nor was any deed or release ever asked or demanded of the plaintiff by said corporation, or either of them; nor was any compensation ever paid, tendered, or offered to him for any of said land nor for any excess so selected by said commission over the one-twentieth of said land in his possession.

23. Admits and alleges that at the time said ordinance 822 was passed and approved, as stated in said amended complaint, the common council of said city was organized and acting under and by authority of said charter of 1851—that is to say, the said act of the Legislature of the State of California entitled "An act to reincorporate the city of San Francisco," approved April 15, 1851.

24. Denies that under and by the terms of the act last named the said common council had full or any power or authority to pass said ordinance 822, or that the mayor had full or any power or authority to approve the same, or that the said ordinance, when so passed and approved, as stated in said amended complaint, became or was a legal or valid ordinance, or vested all the title or any title of said city to said land, or any part thereof, in plaintiff, or
40 that the plaintiff was the actual possessor thereof, or of any part thereof, all or any of the time from January 1, 1855, up to the time of the introduction of said ordinance in the said common council or down to the commencement of this action, or at any time whatever.

25. Denies that no selections were made of any lots or squares by said commission nor by said city for public uses within six months from the passage of said ordinance 822.

26. Admits and alleges that afterwards the common council of said city of San Francisco passed another ordinance, number 845, entitled "Ordinance providing for electing and designating public squares and reservations for hospitals, fire-engines, and school purposes, and for adopting the plan of streets in the western and south-

western portions of the city, according to the provisions of ordinance 822," which was approved by the mayor of said city September 27, 1855, wherein and whereby the said city, through its common council, did purport to ordain and enact, in sections 1, 2, and 3 thereof, as well the matters and things shown by the partial copy thereof contained in subdivision 26 of said amended complaint as certain other and further matters and things; but defendant denies that the said city, through its common council, did in
41 fact legally ordain or enact said last-mentioned ordinance, or any part thereof, and alleges that said ordinance became operative and valid upon the approval of said act of the Legislature of March 11, 1858, only.

27. Admits and alleges that afterwards, to wit, Nov. 12, 1855, said board of aldermen and board of assistant aldermen met in joint convention and selected three commissioners, as prescribed in said ordinances 822 and 845.

28. Admits and alleges that afterwards the city surveyor, acting in conjunction with said commissioners, so selected and with their concurrence did make and furnish, by way of recommendation, to the common council the map or plan of the city hereinafter mentioned; that said map or plan was not made or presented to the common council until April 19, 1856.

29. Denies that in making said map said commissioners violated their instructions or their powers or duties as defined in said ordinances 822 and 844 at all, or in that upon said map they laid out six squares or plazas, each embracing four blocks instead of a single block, corresponding in size with the adjoining blocks, as pretended to be provided in section 6 of ordinance 822, one of which squares of four blocks the said commissioners designated on said map
42 as "Alta plaza," including the parcel of land first described in said amended complaint, and another of said squares, embracing four blocks, being designated by said commissioners on said map as "Hamilton square," including the parcel of land secondly described in said amended complaint; but defendant admits and alleges that said commissioners did designate upon said map one tract of land as "Alta plaza," including the lands first described in said amended complaint, and another tract of land as "Hamilton square," including the tract of land secondly in said amended complaint described.

30. Admits and alleges that said commissioners reported said map, with their said selections thereon designated, to the common council, their constituents, for approval April 19, 1856, and not before, but denies that the selections thereon designated, or any of them, were so made by them in disregard of their power or of their instructions, or that said common council never did approve said map or plan, or that they refused to approve the same.

31. Denies that no selections of land for public or municipal purposes *was* made by said city or by said commission from the lands mentioned in said ordinance 822 within six months after the passage of said ordinance 822, but admits that said commis-
43 sioners did not make or report said map, or any map or plan

or selections, to the common council for its approval until April 19, 1856.

32. Denies that the said land of plaintiff so included in said squares was more than one-twentieth or was more than a tenth of the whole of the land in his possession mentioned in said ordinance 822, after laying out the streets through the same by the city and now existing, or that no compensation has been made, offered, or tendered to plaintiff for any land or for any excess over one-twentieth.

33. Admits that said common council which passed said ordinance 845 was organized and acting under the charter of 1855, so called, being an act entitled "An act to reincorporate the city of 'San Francisco,'" approved May 5, 1855, which took effect the first Monday in July, 1855.

34. Denies that under and by virtue of the act last named said common council had full or any power or authority to pass said ordinance 845, or that the mayor had full or any power or authority to approve the same, or that the said ordinance, when so passed and approved, as stated in said amended complaint, became effective, or was a legal or valid ordinance, or confirmed the said ordinance 822, or gave all or any of the title of said city in said parcels of land, or either of them, or any part thereof, to plaintiff.

44 35. Admits and alleges that, on the 16th day of October, 1856, the board of supervisors of the city and county of San Francisco, (organized and acting under said consolidation act of 1856) passed an order, of which the following is a copy, whereby they did ordain: "That the plan or map of the western addition reported by the commission created under an ordinance of the last common council of the city of San Francisco be adopted by this board and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets;" that the said map or plan referred to in said order is the same map made by said commission and reported to the common council, as above stated, April 19, 1856.

36. Admits and alleges that afterwards, to wit, March 11, 1858, the Legislature of the State of California passed an act entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," which act was approved at the date last named.

45 37. Admits and alleges that in and by said act the above-mentioned ordinances 822 and 845 of said common council, and also the said order of said board of supervisors last above recited, are set out and recited at length, and afterwards said act contains the following enactment ratifying and confirming the same in words and figures following: "Be it therefore enacted, That the within and before recited order and ordinances be, and the same are hereby, ratified and confirmed, and all the land entered or to be entered in the United States land office, in pursuance of section one of the first-recited of said ordinances, in trust shall pass and

inure to and be deemed to have immediately vested in the occupants thereof for their several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress entitled 'An act for the relief of citizens of towns upon the public lands of the United States under certain circumstances,' approved May 23rd, one thousand eight hundred and forty-four, as extended and applied by an act of Congress entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' approved March 3d, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of
46 the said order and ordinances as hereinbefore recited without further proof as full and effectually to all intents and purposes as if they were public acts of the State Legislature.

SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited" (meaning said ordinance 822) "shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof: Provided, That nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco."

47 38. Admits and alleges that the said ordinances 822 and 845, and the said order of said board of supervisors hereinabove referred to, are the same as those set forth and recited in the abovementioned act of the Legislature of the State of California and as printed and published in the Public Acts of the Legislature of said State (at pages 53, 53, 54, 55, and 56 for the year 1858).

39. Admits and alleges that afterwards the Congress of the United States, pending the city's said petition for confirmation, passed an act approved July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California," wherein and by the fifth section thereof it was enacted "that all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of the State of California on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinances of said city, ratified by an act of the Legislature of the said State approved on the 11th of March, 1858, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of "the common council of said city,"'

48 with certain exceptions therein mentioned;" but defendant alleges that the remainder of said act as contained in the fifth section thereof, said section being the only part of said act applicable hereto, is as follows, viz: "There being excepted from this relinquishment and grant all sites or other parcels of land which have been or now are occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land Office by the surveyor general of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: And Provided, That the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

40. Admits and alleges that the premises herein described, the subject of this suit, are within and a part of the land relinquished and granted by said act of Congress as therein mentioned, and not within or any part of any of the exceptions mentioned in said act of Congress.

49 41. Denies that by virtue of the grant to the said city and its successors in said act of Congress, and of the grant and confirmation by said city to the possessors in said ordinances, and of the possession of said land by plaintiff, as pretended and stated in said amended complaint, and of said decree of confirmation by said circuit court of the United States or of said act of Congress, or of said grant and confirmation, or of said possession, or of said decree, or of any said facts or pretences, plaintiff has become, or now is or ever was, the owner or seized in fee-simple absolute, or by any title whatever of the parcels of land described in said amended complaint, or of either of them, or of any part thereof.

42. Denies that said order passed by the board of supervisors of said city and county October 16, 1856, originally when passed or when confirmed by the Legislature as aforesaid had no other purpose or effect than to adopt a then existing plan or map of said city—that is to say, the said map made and reported by said commission—or that it did not (or that the defendant falsely pretends that it did) relate to or affect the title to any land outside of the streets thereon delineated, or that it does not in any manner impair, modify, or repeal said ordinances, or either of them, as originally passed, nor the grants thereby purporting to

50 have been made; but admits that they did not divest any title of plaintiff granted to him by said ordinances, but denies that said order left the said ordinances or the grant to plaintiff therein in full force or operation in all their parts, and alleges that no title whatever was conveyed to plaintiff in said premises by means of said ordinances, or either of them, and that the plaintiff had no title therein, or any part thereof, to be divested.

43. Defendant denies having contrived to annoy or injure plaintiff, or to cast a cloud upon his title to said land, or any part thereof,

or that, contriving to annoy or injure plaintiff or to cast such cloud or otherwise, she falsely or unjustly pretends, or has ever pretended, that plaintiff is not or has not been the owner, or is not or has been entitled to the possession, of said premises, or any or every part thereof, or that defendant is the owner or at any time has been such owner, or that the defendant has the right to the possession thereof for the purpose of public parks or squares; but defendant alleges that plaintiff is not and never has been such owner, and that the defendant has the right to the possession thereof, and has had such right ever since the 11th day of March, 1858, for the purpose of improving and beautifying the same and caring therefor to the end of the convenient use thereof by the public for the purpose of public parks or squares.

51 44. Denies that by the means mentioned in said amended complaint, and not otherwise or at all, plaintiff's lands described in said amended complaint, or any lands mentioned in said amended complaint, falsely or improperly appear on said map as within and a portion of said squares, or that the same, or any part thereof, are or ever were falsely called public squares, or that none of said land was ever in fact, or that any of said land was never in fact, in the use or occupation or possession of defendant, nor of the public, or that, on the contrary, the same, or any part thereof, has been in the continuous or in the exclusive use or occupation of plaintiff, or he claiming the same in his own right, from the year 1850 down to the time of the commencement of this action, or for or at any time whatever.

45. Denies that upon the facts above stated in said amended complaint, or with no other right or title thereto, defendant falsely claims or pretends that said land, or any part thereof, is not the property of plaintiff, or that said act of Congress of 1864 gave plaintiff no title thereto, or that the same is in and a part of the public parks of said city, or dedicated to public use, or that plaintiff is an intruder thereon, or that thereby purchasers or any purchaser of real estate are misled or falsely made to believe that plaintiff

52 has no title to said land, or to any part or every thereof, or that the same, or any part thereof, is a part of said squares, or that plaintiff is but an intruder thereon, or that said lands, or any part thereof, are or ever have been falsely by defendant called public squares.

46. Denies that by reason of the grant of the lands in said ordinances and in said act of Congress, or either, being to the possessors, as a class, without naming them, the title of plaintiff to said premises, though in fact good, depends upon various acts *in pais* to establish his possession and title, or either, to said land, or any part thereof, or that there is no record of such act of possession, or that by reason thereof the pretended false or groundless pretensions of defendant in claiming said land or in allowing it to stand on said map, appearing as a part of said so-called public square, cast a cloud or distrust upon plaintiff's title thereto, or to any part thereof, or so that it, or any part thereof, has become unmarketable, or that plaintiff cannot sell or dispose of the same, or any or every part thereof,

in any manner for one-half its real value, or for its full value, or that all or any of said pretended actings, doings, and pretensions, as stated and pretended in and by the 46th subdivision of said amended complaint, are contrary to equity or to good conscience, or tend to manifest wrong or injury, or any wrong or injury, to plaintiff
53 in the premises, and denies that plaintiff has or ever had in fact a good title to said premises, or any part thereof.

47. Admits and alleges that said land above described in said amended complaint, the subject of this action, is of the value of $20,000 and upwards.

48. Denies that the defendant has not had, or that any predecessor in interest of defendaant has not held or had, the possession of the property in dispute herein at any time within five years; or that defendant has not had, or that no predecessor in interest of defendant has held or had, the possession of said property within ten years prior to the commencement of this action; or that plaintiff for more than nineteen years immediately prior to the commencement of this action has been, or during any part of that time was or at any time had been, in the actual or *bona fide* or uninterrupted or continuous possession of said property described in said amended complaint, or of any part thereof, or claiming the same adversely to the defendant or against the predecessor in interest of the defendant or against the whole world; or that the defendant should not be permitted to set up any claim in or to said property; or that any and all claims which the defendant may have or pretend to have in or to
54 said property, or any part thereof, is barred by the statutes of limitations of the State of California, or by section 319 of the code of civil procedure of the State of California.

Denies that defendant made no demand or that she commenced no suit against plaintiff for said land, or that he held or possessed the same adversely to defendant or to said city, the predecessor of defendant, for more than fourteen years or for any period whatever after the passage of said ordinance 822, or for more than five years after said act of Congress, or for any period whatever prior to the commencement of this action, or with full or any knowledge on the part of defendant or of said city of plaintiff's possession, or of any adverse claim on his part to said land or any part thereof, or that thereby defendant abandoned all or any right to said land, or any part thereof, or should be estopped in equity from now setting up any right or title thereto, or to the possession thereof.

49. Denies that plaintiff can only have adequate or proper relief in the premises in this honorable court.

50. Defendant alleges that in and upon the plan and map mentioned in the ordinances set forth in the act of the Legislature aforesaid of March 11, 1858, and in said act there is men-
55 tioned, set down, and delineated a public square or park designated as "Alta plaza," and another square or park designated as "Hamilton square," and that the piece of land first described in said amended complaint is a part of said tract of land so designated and delineated as "Alta plaza," and the piece of land secondly de-

scribed in said amended complaint is a part of said tract of land so designated and delineated as "Hamilton square."

51. Alleges that ever since the 11th day of March, A. D. 1858, the premises firstly in said amended complaint described have been and still are a part of a common public square or park and as such legally dedicated to public uses and known as "Alta plaza," and that during all that time the premises secondly described in the said amended complaint have been and are a part of a common public square or park and as such legally dedicated to public uses and known as Hamilton square, and that during all of that time it has been and is the right and duty of defendant to have and exercise the immediate control thereof, and to have such possession thereof as is necessary in the matter of improving and beautifying the same for public use and as may be consistent with the proper and agreeable use thereof by the public; that the defendant has expended large
56 sums of money in improving and beautifying said public squares or parks and in controlling the use thereof for the benefit of the public, and is still making such expenditures; that any attempt on the part of the plaintiff at any time to take or have possession or control for himself of the whole or any part of the lands firstly and secondly described in said amended complaint only resulted in his wrongfully and unlawfully placing obstructions and common public nuisances in and upon said public squares or parks, and each of them, contrary to the statutes of this State and the ordinances of said city of San Francisco and of said city and county of San Francisco.

52. Wherefore the defendant asks that the prayer of said amended complaint filed October 15th, 1878, be denied, and that defendant have judgment and a decree against the plaintiff; that plaintiff has not and never had any right, title, or interest of, in, or to the said parcels of land firstly and secondly described in said amended complaint, or either thereof or any part thereof, and that the same and every part thereof, ever since the 11th day of March, A. D. 1858, have been and are parts of common public squares or parks in and of said city and county of San Francisco, and as such squares or parks lawfully dedicated to public uses, with a right in and
57 duty on the part of the defendant to control and care for, improve and beautify, the same for the public convenience, and to have all necessary possession thereof, to the end that the public may enjoy the uninterrupted use thereof, and that any obstructions or common public nuisances placed in or upon the same by plaintiff or his agents or employés may be declared to be such and he and they be required to remove the same and to refrain forever from placing or maintaining such or any other obstructions or common public nuisances in or upon said so described premises or any part thereof, and that the defendant have judgment against plaintiff for cost of suit.

Dated Monday, October 28th, 1878.

W. C. BURNETT,
Defendant's Attorney.

EXHIBIT "A."

Chap. LXVI. An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city. (Approved March 11, 1858.)

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whereas the common council of the city of San Francisco passed an ordinance, approved by the mayor on the
58 twentieth day of June, A. D. one thousand eight hundred and fifty-five, which ordinance is in the words and figures following, to wit:

Number eight hundred and twenty-two. Ordinance for the settlement and quieting of the land titles in the city of San Francisco.

The people of the city of San Francisco do ordain as follows:

§ 1. It shall be the duty of the mayor to enter at the proper land office of the United States at the minimum price all the lands above the natural high-water mark of the Bay of San Francisco at the time of the admission of California into the Union as a State situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests.

§ 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns
59 forever, excepting the property known as the Slip property, and bounded on the north by Clay street, on the west by Davis street, on the south by Sacramento street, and on the east by the water-lot front; and excepting, also, any piece or parcel of land situated south, east, or north of the water-lot front of the city of San Francisco, as established by an act of the Legislature of March twenty-sixth, A. D. one thousand eight hundred and fifty-one: Provided, Such possession has been continued up to time of the introduction of this ordinance in the common council, or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process, and it is hereby declared to be the true intent and meaning of this ordinance that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed: Provided, That all persons who hold title to lands within said limits by virtue of any grant made by any ayuntamiento, town council, alcade, or justice of the peace of the former pueblo of San Francisco before the seventh day of July, one thousand eight hundred

and forty-six, or grants to lots of land lying east of Larkin street and northeast of Johnston street, made by any ayuntamiento, town council, or alcade of said pueblo since that date and before the incor-
60 poration of the city of San Francisco by the State of California, and which grant, or the material portion thereof, was registered or recorded in a proper book of record deposited in the office, or custody, or control of the recorder of the county of San Francisco on or before the third day of April, A. D., one thousand eight hundred and fifty, or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, one thousand eight hundred and fifty-five, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

§ 3. The patent issued or any grant made by the United States to the city shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section as fully and effectually to all intents and purposes as if it were issued or made directly to them individually and by name.

§ 4. The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies or has already set apart for public squares, streets, and
61 sites for school-houses, city hall, and other buildings belonging to the corporation, and also such lots and lands as may be selected and reserved for streets and other public purposes under the provisions of the next succeeding sections.

§ 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose without compensation, and to assess, in the manner provided by the present or any existing charter of the city upon lands bounded on such streets, the whole expense of laying out, opening, grading, and constructing the same; and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance.

§ 6. The city shall also have the right to select and set apart, from the lands west of Larkin street and southwest of Johnston street, as many lots, not exceeding one hundred and thirty-seven and a half feet square each, as the mayor and common council may, by ordinance, determine to be necessary for sites for school-houses, hospitals, fire-engine
62 houses, and other public establishments necessary and proper for the use of the corporation, and may lay out and reserve upon the said land, at convenient and suitable points and distances, public squares, which shall not embrace more than one block, corre-

sponding in size to the adjoining blocks: Provided, That the selection shall be made within six months from the time of the passage of this ordinance, and that the city shall not, without due compensation, occupy for the purposes mentioned in this section, after laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person, and that such possessor shall voluntarily assent thereto, or, refusing to do so, shall not be entitled to the benefit of any concession contained in the second and third sections of this ordinance.

§ 7. The lots and lands reserved for the use of the corporation under the provisions of the next preceding section shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in possesion of the respective occupants as to make the apportionment as nearly equal as circumstances will admit.

§ 8. The selection of said land and lots shall be made by a commission to consist of three persons, who shall be chosen by the
63 common council in joint convention, who shall report the same to the common council for its approval, and upon such approval deeds of release to the corporation for the lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart, respectively.

§ 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any other outstanding title to the said lands adverse to the said possessors.

§ 10. Application shall be made to the Legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands for the uses and purposes hereinbefore specified.

§ 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States land commission for pueblo lands for the several use, benefit, and behoof of the said possessors mentioned in section two, as to the lands by them so possessed, and for the proper use, benefit, and behoof of the
64 corporation as to all other lands not hereinbefore released and confirmed to the said possessor.

§ 12. That all ordinances or parts of ordinances conflicting with this ordinance or any of its provisions be, and the same are hereby, repealed.

Approved June twentieth, one thousand eight hundred and fifty-five.

S. P. WEBB, *Mayor.*

And whereas the said common council passed another ordinance, approved by the mayor of said city September twenty-seventh, A. D.

one thousand eight hundred and fifty-five, which last-mentioned ordinance is in the words and figures following, to wit:

Number eight hundred and forty-five. Ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engines, and school purposes, and for adopting the plan of streets in the western and southwestern portions of the city, according to the provisions of ordinance number eight hundred and twenty-two, and confirmatory of said ordinance number eight hundred and twenty-two.

The people of the city of San Francisco do ordain as follows:

§ 1. Under and by virtue of the provisions of the ordinance
65 of the common council number eight hundred and twenty-two, entitled "An ordinance for the settlement and quieting of land titles in the city of San Francisco, approved June twentieth, one thousand eight hundred and fifty-five," the board of aldermen and board of assistant aldermen shall meet in joint convention at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section eight of said ordinance number eight hundred and twenty-two.

§ 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners and with their concurrence, to furnish, by way of recommendation, to the common council within one month from the date of their appointment a plan for the location and dimensions of streets to be laid out within the city limits west of Larkin and southwest of Johnston streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city under the provisions of the aforesaid ordinance number eight hundred and twenty-two: Provided, That the compensation of said commissioners shall not exceed the sum of one hundred dollars each, payable when the common council may legally make an appropriation therefor.

66 § 3. The said ordinance number eight hundred and twenty-two, referred to in the preceding section one, is hereby reordained, ratified, and confirmed in all its parts.

Approved September twenty-seventh, one thousand eight hundred and fifty-five.

JAMES VAN NESS, *Mayor.*

And whereas, in pursuance of the aforesaid ordinances, commissioners were appointed by the common council, who, in conjunction with the city surveyor of said city, agreed upon and reported for the approval of the common council a plan for the location of streets, public squares, and lots for public uses to be laid out west of Larkin and southwest of Johnston streets, in said city, accompanied by a map of the same, which said plan and map was, by the justices of the peace exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved, and ratified by an order bearing date the sixteenth day of October, A. D. one

thousand eight hundred and fifty-six, which is in the words and figures following, to wit:

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the western addition reported
67 by the commission created under an ordinance of the last common council of the city of San Francisco be adopted by this board and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets.

Be it therefore enacted, That the within and before cited order and ordinances be, and the same are hereby, ratified and confirmed, and all the land entered, or to be entered, in the United States land office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress entitled An act for the relief of citizens of towns upon the public lands of the United States under certain circumstances, approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress entitled An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes, approved March third, one thousand
68 eight hundred and fifty-three, and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof as fully and effectually to all intents and purposes as if they were public acts of the State Legislature.

SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof: Provided, That nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco.

69 *Findings of Fact and Conclusions of Law.*

(Title of court and cause.)

The above-entitled cause came on regularly for trial by the court (without a jury, a trial by jury having been waived by stipulation of the parties duly entered of record) on this 24th day of December, 1878, when S. W. Holladay appeared as attorney for the plaintiff, Milo Hoadly, and W. C. Burnett, Esq., city and county attorney, appeared as attorney for The City and County of San Francisco, defendant, when various proofs and evidence, oral and documentary, were introduced by the respective parties, and the case having been fully argued by the respective counsel above named, and submitted to the court for decision, and the court having fully understood and considered the premises, now finds and decides as follows:

That the parcels of land described in the complaint, which are the subject-matter of this suit, are situated in the city and county of San Francisco, State of California, west of Larkin street, and within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of said State, and approved April 15th, 1851.

That in the spring of the year 1850 plaintiff entered upon
70 and reduced to his actual possession a parcel of land called the "Hoadly tract," including the premises in dispute, and from that time down to the commencement of this action, January 5th, 1870, plaintiff continued in the actual, open, and exclusive possession, occupation, and dominion of said premises, and the whole thereof, claiming the same in his own right as the owner thereof adversely to the late city of San Francisco and its successor in interest, the defendant herein, and to all the world.

That prior to the year 1848 there existed at the place afterwards occupied by said city of San Francisco a town or pueblo, claiming title in its corporate capacity to four square leagues of land, including the premises in question, which town or pueblo continued till the incorporation of the city of San Francisco, and the city of San Francisco at its corporation became the successor of the pueblo aforesaid, and so continued until the consolidation of the city and county of San Francisco; whereupon said city and county became and still is the successor of said pueblo and of said city of San Francisco.

That the parcels of land herein mentioned as the subject of this action are situated within the limits of the former pueblo and within the corporate limits defined in "An act to reincorporate the city
71 of San Francisco," passed April fifteenth, A. D. 1851, and are part of the four square leagues of land claimed by said pueblo and afterwards claimed and petitioned for by and confirmed to said city, as hereinafter stated, and are not among or part or parcel of any exceptions or reservations mentioned or contained in the decree of confirmation hereinafter referred to, but are a part of the land and premises mentioned and referred to in each and every of the ordinances and the order and the act of March 11th, 1858, herein mentioned.

That on the 2d day of July, 1852, the city of San Francisco, then organized as a corporation under said act of April 15th, 1851, presented her claim as successor to said pueblo and petition for confirmation to four square leagues of land, including the land herein mentioned, to the board of commissioners organized and acting under the act of Congress entitled "An act to ascertain and settle private land claims in the State of California," approved March 3d, 1851, which claim was confirmed by said commissioners; and afterwards, on the 18th of May, 1865, said claim was finally confirmed by the decree of the circuit court of the United States for the district of California, to which court said claim and petition had been transferred by law, of which decree a true copy is as follows, viz.:

72 "THE CITY OF SAN FRANCISCO *vs.* THE UNITED STATES.

"The appeal in this case, taken by the petitioner, The City of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the State of California, entered on the 21st day of December, 1854, by which the claim of the petitioner was adjudged to be valid and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the northern district of California pending said appeal, the said case having been transferred to this court by order of the said district court under the provisions of section four of the act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864, and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged, and decreed that the claim of the petitioner, The City of San Francisco, to the land hereinafter described is valid, and that the same be confirmed; that the land of which
73 confirmation is made is a tract situated in the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco, on the west by Pacific ocean, and on south by a due east and west line, drawn so as to include the area aforesaid, subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been by grants from lawful authority vested in private proprietorship and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose, all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirma-

tion is in trust for the benefit of the lot-holders under grants
74 from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city.

"San Francisco, May 18th, 1865.

"FIELD, *Circuit Judge.*"

That the common council of said city of San Francisco passed an ordinance, number 822, entitled "An ordinance for the settlement and quieting of the land titles in the city of San Francisco," which was approved by the mayor of said city of San Francisco June 20th, 1855, which ordinance is set forth in full in an act of the Legislature of this State entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11th, 1858 (statutes of 1858, page 52, *et seq.*), and is hereby referred to and by reference made part of this finding.

No selections were made of any lots or squares by the commission mentioned in said ordinance No. 822, nor by said city, for public uses within six months from the passage of said ordinance 822 by the common council.

That afterwards the common council of said city of San Francisco passed another ordinance, known as ordinance number 845, which ordinance is set forth in full in said act of the Legislature
75 approved March 11th, 1858, and is hereby referred to and by reference made part of this finding.

That on and after the passage of said ordinance No. 822, and before the passage of said ordinance No. 845, namely, August 8th, 1855, James Van Ness, the mayor of said city, sent a message in writing to the common council, of which the following is a copy:

"To the common council:

"GENTLEMEN: By the terms of the ordinance approved June 20th, 1855, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' it is provided that a commission, consisting of three persons, shall be chosen by the common council in joint convention, whose duty it shall be to select from the lands within the corporate limits of the city, and lying west of Larkin street and southwest of Johnston street, as many lots as the mayor and common council may by ordinance determine necessary for public and municipal purposes, and that selection shall be made within six months from the passage of the ordinance so approved June 20th, 1855.

"The ordinance also declares that the city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin
76 street and southwest of Johnston street and reserve the right, &c.

"I would respectfully suggest to the common council the propriety and expediency of adopting at an early moment the necessary measures to ascertain the lines and boundaries of the streets

contemplated to be laid out and opened in the as yet unsurveyed portion of the city, and also to determine by ordinance the number and dimensions of the lots to be selected for public and municipal purposes by the commission above referred to, and, further, to appointed the said commission.

"It will readily be seen that until these preliminary steps are taken by the common council it will be impossible to determine with accuracy which lands are destined for streets and other public uses and which are to be retained by the proprietors as private domain. In this condition of things improvements in western and southwestern portions of the city will be greatly retarded, and the wholesome and general benefits expected to be derived from the passage of the ordinance for the settlement and quieting of land titles within the city will be correspondingly delayed.

"JAMES VAN NESS, *Mayor*."

The following is the record of action taken on said message:

77 "In the board of assistant aldermen, August 8th, 1855, on motion, the message was referred to the committee on streets and public improvements and ordered published."

"In the board of aldermen of said city, August 8th, 1855, said message was referred to the committee on streets and public improvements and ordered published."

August 11th, 1855, the committee last named made a report to the board of assistant aldermen "in favor of the recommendations expressed in said message, and that in compliance therewith they have carefully prepared the ordinance herewith presented."

The ordinance so reported, last above referred to, is the said ordinance 845.

In the board of assistant aldermen, August 11th, 1855, on motion, the report was accepted and adopted.

In the board of aldermen said message of the mayor was referred to the judiciary committee, who made their report thereon to the said board of aldermen September 24th, 1855, of which report the following is a copy:

"Your committee, to whom was referred the message of his honor the mayor and an ordinance in accordance with the recommendations thereof entitled 'An ordinance providing for selecting
78 and designating public squares and reservations for hospitals, fire-engines, and school-houses, and adopting the plan of streets in the western and southwestern portions of the city, according to the provisions of ordinance No. 822, and confimatory of said ordinance No. 822,' adopted by the board of assistant aldermen August 11th, 1855, respectfully report that they have carefully examined the same and have arrived at the conclusion that no measure ever originated in the common council capable of confirming a title of the benefits upon the city at large which may be derived from said ordinance No. 822. We ascertained from personal investigation that his honor the mayor, in his recommendation of fixing at an early day a plan of streets and designating the reservations the

city may make in compliance with ordinance No. 822, *but* effects the wishes and requirements of several thousand inhabitants of the city who are prevented by delay in these particulars from making proper and desirable improvements.

"We therefore recommend concurrent action by this board with the board of assistant aldermen upon the ordinance, which, with accompanying papers, *are* respectfully submitted.

"WILLIAM GREEN,
"C. H. CORSER,
"*Committee of Judiciary.*"

79 That afterward, to wit, Nov. 12th, 1855, said board of aldermen and board of assistant aldermen met in joint convention and selected three commissioners, as prescribed in said ordinances 822 and 845.

By an ordinance approved December 21st, 1855, the commissioners, to make selection of lots, &c., were "granted until the 20th of March, 1856, to complete their labors," and by a similar ordinance, approved April 7th, 1866, said commissioners were "granted until the 20th day of April, 1856, to complete their labors."

On the 19th day of April, 1856, the said commissioners made their report to the common council, accompanied by the said map, of which report the following is a copy:

"To the hon. common council of the city of San Francisco:

"GENTLEMEN: The undersigned commissioners, appointed to select under the provisions of ordinance No. 822 lots and squares for school, fire, hospital, and other public purposes in that portion of the city west of Larkin and southwest of Johnston streets, and to lay out the streets therein, beg leave to make the following report:

"Your commissioners, after a patient and thorough examination of the land, have adopted the accompanying plan or map
80 thereof, showing the streets so laid out, and the lots and squares selected for the above public purposes, and recommended its adoption as the official map of the portion of the city above-mentioned. Your commissioners found it was impossible to perform the work assigned them without a partial survey being first made; and as no provision was made by the city for defraying the expenses of such survey, they became responsible for the hire of Chinamen, flagmen, and other expenses incidental to the survey, expecting to be reimbursed by subscription, which has been partially done. The annexed schedule, marked 'A,' shows the total amount of their disbursements in making the survey.

"The number of school lots selected is twenty-eight (28), their size one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half feet (137½ by 137½), except those located on the Potrero, which are one hundred feet by two hundred feet (100 ft. by 200 ft.). The number of lots for fire purposes is twenty-five (25), their size thirty feet by one hundred and thirty-seven and one-half feet (30 ft. by 137½ ft.), except those located on the Potrero, which are thirty feet by one hundred feet (30 ft. by 100 ft.); six (6)

squares or plazas are selected, size four (4) blocks, containing
81 about twelve acres each (12 a.), and four (4) squares, size two (2) blocks, containing about five (5) acres each, and one lot for hospital, size two (2) blocks. Perhaps more lots and squares have been selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since as a city enlarges so do her wants.

"Ordinance No. 822 gave your commissioners the power to take only one-twentieth ($\frac{1}{20}$) of the land of one person for school, fire, hospital, and other public purposes. In a great many instances they found in laying out the lots for such purposs ethat in order to place them at proper distances from each other they would fall entirely upon the land of one person, or cover his house or yard; and, moreover, in many cases such persons did not own more than one block. In order, then, to avoid such difficulties we were forced to locate some of the public lots and squares in places different from those originally designated.

"Your commissioners also made a personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city whenever called upon, provided the city would deed to them her right and title to the balance of their claim.

82 "The time is passed when it is necessary to support this course by argument. The city has pledged its faith by ordinance 822, the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it.

"Your commissioners would therefore recommend the appointment of two or three suitable persons with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title of the city to all parties in possession as contemplated by ordinance No. 822.

"All of which is respectfully submitted.

"April 19th, 1856.

"MICHAEL HAYES,
"C. H. GOUGH,
"*Commissioners.*

"JOHN T. HOFF,
"*City Surveyor.*"

In the board of assistant aldermen, April 21st, 1856, said report and map were received, and said report read and ordered published, and laid over for further consideration.

That in making said map said commissioners laid out thereon six squares or plazas, each embracing four blocks in size corresponding with the adjoining blocks, one of which squares of four blocks the said commissioners designated on the map as
83 "Alta plaza," including the parcel of land first described in the complaint, and another of said squares, embracing four blocks of the same size, said commissioners designated on said map as "Hamilton square," including the parcel of land secondly described in the complaint.

That no selection of land for public or municipal purposes was made by said city or by said commission from the lands mentioned in said ordinance 822 within six months after the passage of said ordinance 822, nor did said commissioners make or report said map or any map or plan or selections to the common council for its approval for more than six months after their appointment, and not until the 19th day of April, 1856, when they reported the said map as above stated.

That the land included in said square embraces more than one-twentieth, and more than a tenth of the whole of the land in plaintiff's possession, mentioned in said ordinance 822, after laying out the streets on said map through the same by the city and now existing, and no compensation has been made, offered, or tendered to plaintiff for any land nor for said excess over one-twentieth.

On the 15th of October, 1856, the board of supervisors of the city and county of San Francisco passed an order or ordinance, of which the following is a copy, to wit:

84 "The board of supervisors of the city and county of San Francisco do ordain as follows:

"1. That the plan or map of the western addition reported by the commission created under an ordinance of the last common council of the city of San Francisco be adopted by this board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservations of squares and lots for public purposes in that proportion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets," which order or ordinance is set forth in full in said act of March 11th, 1858.

The said act of the Legislature of the State of California, with the said ordinance therein mentioned and confirmed, is found printed and published in the volume of statutes of this State for the year 1858, at pages 52 to 56, both inclusive, and the same is therein designated as chapter LXV, and the same is hereby referred to for greater certainty and made part thereof. The map herein mentioned and reported by said commissioners is the same map referred to in said order or ordinance of October 16th, 1856, and in said act of the Legislature of March 11th, 1858.

Afterwards the Congress of the United States passed an act

85 entitled "An act to expedite the settlement of titles to land in the State of California," approved July 1st, 1864, the fifth section of which, being the only part of said act which relates to this matter, reads as follows:

SEC. 5. And be it further enacted, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in an act incorporating said city passed by the Legislature of the State of California on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinances of said city, ratified by an act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the

city of San Francisco, and to ratify and confirm certain ordinances of the common council of this city.'"

It was stipulated by the respective counsel in open court upon the trial of this cause that they or either of them, upon the trial, or upon motion for a new trial, or upon the hearing of any appeal in this case, might read or quote from the published statutes or volumes containing any of the above-mentioned statutes, ordinances, or proceedings.

86 *Conclusions of Law.*

As conclusions of law from the foregoing facts the court now finds and decides as follows:

1. That the parcels of land in dispute herein were reserved from the land granted in the ordinances and proceedings above recited, and no part of said parcels of land *were* ever granted to the plaintiff by any competent authority.

2. That said parcels of land were by the proceedings above recited dedicated to public uses.

3. That the plaintiff at the time of the commencement of this action had not, nor has he now, any right or title to any part of the premises in dispute.

4. That the defendant is entitled to judgment accordingly, and the same will be so entered.

WM. P. DANGERFIELD,
District Judge.

Filed September 9th, 1879.

Decree.

(Title of court and cause.)

This cause came on regularly for trial before the court without a jury on the 24th day of December, 1878, on the issues of fact joined between the plaintiff Milo Hoadly and the defendant municipal corporation, The City and County of San Francisco, S. W. Holladay, Esq., appearing as attorney for the plaintiff and W. C. Burnett, Esq., appearing for said defendant, and witnesses having been sworn and their evidence and certain documentary evidence submitted to the court and the case closed, and argument of counsel had and the law and the facts of the case having been duly considered by the court, it is now therefore ordered, adjudged, and decreed that at the time of the commencement of this suit, namely, January 5, 1870, said plaintiff was not, never had been, never has been, and is not now the owner in fee-simple absolute or in the actual or exclusive possession of all and singular the lands and premises described in the last amended complaint herein and hereinafter described, or of any part thereof, and that said plaintiff had not then or at any other time, and has not now, any right, title, or interest in said land and premises, or in any part thereof; that at the time of the commencement of this suit said defendant was, and still is, the owner in fee-simple absolute of all of said land and prem-

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ises and entitled to the possession thereof, subject only to the right of the public to use the same as parts of public squares, to which use the said premises have been duly dedicated ever since the eleventh day of March, 1858, and that the title of the defendant to said land and premises be, and the same is hereby,
88 quieted and adjudged good and paramount as against the plaintiff and all persons and parties claiming the same, or any part thereof, through or under said plaintiff, since the commencement of this suit, and that said plaintiff, his agents, attorneys, servants, and employees be, and they are hereby, restrained and enjoined from setting up or claiming any right, title, or interest in said land and premises, or any part thereof, or in the possession of the same, and from meddling or interfering with the same; and it is further decreed that they do forever refrain from placing or maintaining any obstructions or common public nuisances in or upon said described premises, or any part thereof, and that defendant have judgment against plaintiff for her costs of suit in the sum of one hundred and thirty-eight $\frac{50}{100}$ dollars.

The said land and premises in said amended complaint mentioned and herein referred to and intended are situated in said city and county of San Francisco, State of California, and are bounded and described as follows:

First. Commencing at the point of intersection of the northern line of Clay street with the eastern line of Scott street, running thence northerly along the last-named line two hundred and seventy-five (275) feet, more or less, to the north line or boundary
89 of the Hoadly claim; running thence in a line due east along the north line of the Hoadly claim to its intersection with the western line of Pierce street; thence southwardly along said western line of Pierce street two hundred feet, more or less, to the northerly line of Clay street; thence westwardly along the last-named line four hundred twelve and a half (412½) feet, more or less, to the place of beginning.

Second. Commencing at the point of intersection of the southern line of Post street with the eastern line of Scott street, running thence southwardly along the last-named line two hundred and seventy-five (275) feet to the northern line of Geary street; thence eastwardly along the last-named line four hundred twelve and a half (412½) feet to the western line of Pierce street; thence northerly along the last-named line two hundred and seventy-five (275) feet to the southern line of Post street; thence westwardly along the last-named line four hundred twelve and one-half (412½) feet to the place of beginning.

WM. P. DAINGERFIELD,
District Judge.

Decree recorded Sept. 19th, 1879, (Book L, page 102).

90 *Notice of Intention to Move for a New Trial with Service Thereon.*

(Title of court and cause.)

W. C. Burnett, Esq., attorney for defendant:

You will please take notice that the plaintiff in the above-entitled cause intends to move for a new trial therein. Said motion will be made upon the following grounds:

First. Insufficiency of the evidence to justify the decision in favor of the defendant and against the plaintiff.

Second. That said decision is against law.

Said motion will be made upon a statement of the case.

Dated San Francisco, Sept. 29, 1879.

S. W. HOLLADAY,
Att'y for Plaintiff.

Due service of a copy of the within notice is hereby acknowledged September 29, 1879.

W. C. BURNETT,
Att'y for Defendant.

Filed Sept. 29, 1879.

91 *Statement on Motion for a New Trial.*

(Title of court and cause.)

Now comes Milo Hoadley, the plaintiff herein, and presents this his statement on his motion for a new trial, pursuant to notice of his intention to move for a new trial heretofore served and filed, as follows:

The matter involved in this suit is the question of title, possession, and dedication to public uses of the land described in the complaint therein, plaintiff claiming the title and right to the possession thereof to be in himself, while the defendant, The City and County of San Francisco, a municipal corporation, claims that said premises never belonged to plaintiff, but that the same *has* been lawfully dedicated to public uses as parts of two public squares or plazas within said city and county.

At the trial, which occurred December 24th, 1878, there was no conflict of evidence as to the facts, and the proceedings at said trial and the facts which were then adduced in evidence are correctly narrated in the findings of fact, which were afterwards signed by the judge of the court and filed September 9th, 1879, and no other evi-

92 dence or matter of fact was adduced at said trial beyond those recited in said findings, except the reading and consideration of the statutes of the State of California and of the United States and any other printed and published books of public concern which it was agreed that either party might read from at any time in the consideration of this case.

Now, therefore, for the purpose of this motion for a new trial the said findings of fact are hereby referred to and made a part of this statement, and as to the insufficiency of the evidence to justify the

said decision of the court against said plaintiff and in favor of defendant plaintiff specifies the following particulars:

That the ordinances 822 and 845 and the act of the Legislature in confirmation thereof, dated March 11th, 1858, gave the title to the premises in question to the plaintiff, the possessor thereof, while neither the ordinance of the board of supervisors of October 16th, 1856, adopting the map, nor any other ordinance, statute, or act of any competent authority, ever reserved the demanded premises from the grant to plaintiff, the possessor, contained in said ordinances 822 [and] 845 and the act of the Legislature of March 11, 1858, and the act of Congress of July 1, 1864, confirming said act of the Legislature of March 11th, 1858.

And further (as to the insufficiency of the evidence to jus-
93 tify said decision) plaintiff specifies that the evidence in the case as shown and found by the court in said findings was that the plaintiff was in possession of the land from the spring of the year 1850 down to the time of the commencement of this action, while the decision of the court entered in the judgment herein is to the effect that plaintiff never was in the possession of the premises in dispute or any part thereof.

And for the purpose of said motion for a new trial defendant further specifies that said decision is against law, and specifies that on the facts found by the court the plaintiff is shown to be the lawful owner and entitled to the possession of the land in suit free and clear of all dedication to public uses, and the decision should have been for plaintiff and not for defendant.

Wherefore plaintiff now moves that said decision heretofore rendered by the court herein against plaintiff and in favor of defendant be vacated and a new trial granted.

October 17, 1879.

S. W. HOLLADAY,
Att'y for Plaintiff.

Due service of the foregoing is admitted.
October 17, 1879.

W. C. BURNET,
Att'y for Defendant.

94 The foregoing statement on plaintiff's motion for a new trial is hereby settled and certified as correct and true, the same having been agreed to by the respective parties.

San Francisco, Cal., November 4, 1879.

WM. P. DAINGERFIELD,
District Judge.

Filed November 4, 1879.

Denial of Motion for a New Trial.

(Title of court and cause.)

NOVEMBER 5TH, 1879.

In this cause the plaintiff's motion for a new trial was this day presented and argued by S. W. Holladay, Esq., attorney for plaintiff,

and by W. C. Burnett, Esq., attorney for the defendant, and the court having duly considered the law and facts of the case: Now, therefore, it is hereby ordered that the said motion for a new trial be, and the same is hereby, refused.

Notice of Appeal.

(Title of court and cause.)

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State
95 from the judgment therein rendered and entered in the said district court on the 19th day of September, A. D. 1879, in favor of the defendant in said action and against said plaintiff, and from the whole thereof, and also from the order denying said plaintiff's motion for a new trial made and entered in the minutes of the said court, the 5th day of November, A. D. 1879.

Yours respectfully,

S. W. HOLLADAY,
Attorney for Plaintiff.

Dated this 6th day of November, 1879.

To the clerk of said district court and W. C. Burnett, Esq., attorney for defendant.

Filed and served Nov. 6, 1879.

Clerk's Certificate.

OFFICE OF THE COUNTY CLERK OF THE
CITY AND COUNTY OF SAN FRANCISCO,
STATE OF CALIFORNIA.

I, the undersigned, David Wilder, county clerk of the city and county above named and *ex officio* clerk of the superior court in and for the said city and county of San Francisco, and as such having in my custody the records of the late district court of the 12th judicial district in and for the city and county aforesaid, do hereby certify that the foregoing are full, true, and correct
96 copies of the following papers and records in the case of Milo Hoadley *vs.* The City and County of San Francisco, No. 15332, in the said late 12th district court, as they remain of record in my office, namely:

1st. The amended complaint.
2d. The answer thereto.
3d. The findings.
4th. The judgment thereon for the defendant.
5th. Plaintiff's notice of intention to move for a new trial thereon.
6th. Statement on plaintiff's motion for a new trial thereon.
7th. Order refusing new trial thereon.
8th. Notice of appeal, together with the date of service and filing on each paper, respectively.

And I further certify that an undertaking on appeal in due form has been properly filed herein on the part of said appellant.

In witness whereof I have hereunto set my hand and official seal this 19th day of December, A. D. 1882.

DAVID WILDER, *Clerk*,
By J. D. RUGGLES,
Deputy Clerk.

[SEAL.]

Filed Dec. 19, 1882.

F. W. GROSS, *Clerk*,
By J. A. McKENNA, *Deputy.*

97 *Clerk's Certificate.*

I, Frank W. Gross, clerk of the supreme court of the State of California, hereby certify that the foregoing printed transcript is a full and correct copy of the transcript furnished me by the appellant in the within-named action, wherein Milo Hoadley is appellant and The City and County of San Francisco is respondent.

In witness whereof I have set my seal of said court, at San Francisco, this 28 day of December, 1882.

FRANK W. GROSS,
Clerk Supreme Court,
By C. HARLAN, *Deputy.*

[SEAL.]

98 STATE OF CALIFORNIA, } *ss:*
County of San Francisco, }

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that I served a copy of the within transcript upon the attorney of respondent by this day depositing a copy of said transcript in the U. S. mail, postage paid, addressed to W. C. Burnett, Esq., attorney-at-law, 220 Sansome St., San Francisco, Cal.

Witness my hand and the seal of said court, at San Francisco, this 28th day of December, 1882.

F. W. GROSS,
Clerk of Supreme Court,
By J. B. MARTIN, *Deputy.*

[SEAL.]

99 & 100 *Submission of Cause.*

In the Supreme Court, State of California. In Bank.

MILO HOADLEY, Appellant.

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Sept. 11th, 1885.—Ordered heard in bank by chief justice.

February 8th, 1886.—Continued until Friday, February 19th, 1886, at 10 a. m.

February 19th, 1886.—Ordered that oral argument be continued until March 5th, 1886.

March 5th, 1886.—Argued by Holladay for appellant, Love for respondent. Ordered, That appellant be allowed 20 days to file brief; respondent 5 days to reply; cause to be thereupon submitted.

101 March 12th, 1886.—Motion of Holladay for further oral argument denied.

April 16th, 1886.—Filed respondent's brief, and submitted.

August 20th, 1886.—Filed petition for rehearing.

August 28th, 1886.—Rehearing denied by the court.

102 *Judgment.*

In the Supreme Court of the State of California. In Bank.

MILO HOADLEY, Appellant,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Respondent. } No. 8762.

On appeal from the district court in and for the city and county of San Francisco.

And now at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J.

We concur: McKee, J.; McKinstry, J.; Sharpstein, J.; Myrick, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the district court in and for the city and county of San Francisco in the above-entitled cause be, and the same are hereby, affirmed with costs.

Made and entered July 30, 1886.

J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy*.

103 *Opinion.* (*Filed July* 30, 1886.)

HOADLEY
vs.
CITY AND COUNTY OF SAN FRANCISCO. } No. 8762. In Bank.

This action was instituted to quiet title of plaintiff to two parcels of land situate in the city and county of San Francisco and within that portion of said county to which the ordinances 822 and 845 of the common council of said city and county and an order passed by the justices of the peace of the defendant corporation on the 16th of October, 1856, ratified by the act of the Legislature of this State approved March 11, 1858, apply. One of the parcels of land in controversy forms a part of Alta plaza and the other a part of Hamilton square.

This cause was here before on appeal (see 50 Cal., 265), and on that appeal this court held that the plaintiff acquired no title to the lots or squares in question either by the Van Ness ordinance or by adverse possession. The questions are presented now under the same state of facts, and the above rulings of the court must be re-

garded as the law of the case in all its stages. In this condition of things we see no reason why the points above mentioned should be further considered. (See Sawyer *vs.* San Francisco, 50 Cal., 370; People *vs.* Holladay, 9 West C. Rep., 327; Visalia *vs.* Jacob, 65 Cal., 434.)

The point made on behalf of plaintiff as to the fact that the squares in question embrace more than one-twentieth of the land in possession of the plaintiff and that the excess above such one-twentieth was taken without compensation as provided in section 6 of ordinance 822 we regard as settled by this court in Sawyer *vs.* San Francisco, *supra*, adversely to the contention of the plaintiff.

The reasons on which the rule just above mentioned as to the taking of more than one-twentieth, as settled in San Francisco *vs.* Sawyer, *is rested*, apply to the point made here that more than one block was taken to make up the squares in controversy. The survey and map of these squares so including four blocks each was approved, ratified, and confirmed by the act of the 11th of March, 1858 (Stats. 1858, p. 53), and from such approval the survey and map above mentioned acquired validity. Whatever rights the plaintiff acquired under the Van Ness ordinance he took subject to the act of 1858, which approved the survey and map above mentioned.

This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the ordinance 822 allowing title to be made under it by a possession designated in it, and ratified also ordinance 845 and the order of the justices approving the survey and map above mentioned, and when the act of 1858 was passed the doctrine of relation could vest in the plaintiff no greater rights than he took under the act of 1858. Any rights which plaintiff derived under the act of 1858 would be subject to all its provisions. At the same time that ordinance 822 was ratified the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace of a contract between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein.

The above embraces all the points in the case which are necessary to be considered. We find no error in the record, and the judgment and order must be affirmed.

Ordered accordingly.

THORNTON, *J.*

We concur.

McKEE, *J.*
McKINSTRY, *J.*
SHARPSTEIN, *J.*
MYRICK, *J.*

104 *Bond.*

Supreme Court of the State of California. In Bank.

MILO HOADLEY, Plaintiff and Appellant,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.
} No. 8762.

Whereas the above-named Milo Hoadley is about prosecuting a writ of error *from* the Supreme Court of the United States *to* the above-named supreme court of California in the above-entitled cause, wherein the final judgment has lately been rendered in favor of said city and county and against said Milo Hoadley; and whereas said Milo Hoadley is about to apply for a citation of the above-named defendant [and] respondent, in pursuance of said writ of error: Now, therefore, we, the undersigned, the said Milo Hoadley, as principal herein, and A. W. Scott and John McCord, his sureties
105 herein, do hereby undertake and promise the said Milo Hoadley, plaintiff in error, shall prosecute his said writ to effect, and if he fail to make his plea good he shall answer all costs that may be adjudged against him therein.

San Francisco, California, October 30th, 1886.

MILO HOADLEY.
A. W. SCOTT.
JOHN McCORD.

STATE OF CALIFORNIA,
City and County of San Francisco:

A. W. Scott and John McCord, the sureties above named, being severally duly sworn, depose and say that they are each, respectively, resident and freeholders in said city and county of San Francisco; that they are respectively worth the sum of three thousand
106 dollars over and above all their just debts and liabilities, exclusive of property exempt from execution.

JOHN McCORD.
A. W. SCOTT.

Sworn and subscribed before me this 30th day of October, 1886.
[SEAL.] E. H. THARP,
Notary Public.

Approved by me.

R. F. MORRISON,
Chief Justice of Cal.

(Endorsed:) Filed Nov. 3, 1886. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

107 *Assignment of Errors on Writ of Error to the Supreme Court of California.*

Supreme Court of the United States.

MILO HOADLEY, Plaintiff in Error,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, Defendant in Error.

Milo Hoadley, the plaintiff in error herein, assigns the following errors:

Assignment of errors.

1st.

That in the final judgment and decision of this cause by the supreme court of the State of California was drawn in question the validity of the statute of said State entitled An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city, approved March 11th,
108 1858, being chapter 66, page 52 to page 56, inclusive, of the volume of statutes of California for the year 1858 (also printed in defendant's answer, Exhibit "A," in present record).

The said act, in so far as it purports to or does ratify or confirm the order (recited in said act) of the board of supervisors of the city and county of San Francisco bearing date the 16th of October, 1856, adopting the plan of the city in respect to the reservation of squares and lots for public purposes (including the land in dispute), is repugnant to the Constitution of the United States, in that it impairs the obligation of the contract, viz., the grant contained in section two of ordinance No. 822, passed in 1855, set forth in and ratified and confirmed by said act of 1858, and the decision of said supreme court was in favor of the validity of said act wherein it pur-
109 ports to ratify and confirm said order of the board of supervisors passed in 1856, reserving and dedicating the land in question for public purposes, notwithstanding the said grant of the said land to plaintiff, Milo Hoadley, by section 2 of said ordinance 822, passed in 1855, which latter section is specifically ratified and confirmed and made effective by section two of said act of March 11th, 1858.

This was error.

2d.

The said act of March 11th, 1858, in so far as, by ratification or otherwise, it purports to reserve or dedicate the land in question for squares or other public purposes, is repugnant to section 10 of article one of the Constitution of the United States. The decision of said supreme court was in favor of its validity.

This was error.

3d.

Said act of March 11th, 1858, in so far as it purports to
110 ratify and confirm said order of the board of supervisors of October 16th, 1856, is repugnant to the Constitution of the

United States and impairs the obligation of the contract or grant contained in section 2 of said ordinance 822, ratified and confirmed by section 2 of said act of March 11th, 1858, and said court decided that the act confirming the said reservation and dedication for public purposes was valid.

This was error.

4th.

Section 2 of ordinance 822, passed in 1855, ratified in 1858, and made effective by section 2 of said act of 1858, vested the estate in plaintiff, he being one of the actual possessors mentioned in said section, as shown in the findings, and the said act of 1858, in so far as it ratifies said order of 1856, tends to divest the estate from
111 plaintiff, and is repugnant to the grant to plaintiff thus ratified, and repugnant to the Constitution of the United States. Said court decided in favor of the validity of said act ratifying said order.

This was error.

San Francisco, Nov. 3, 1886.

S. W. HOLLADAY,
Att'y for Pl'ff in Error.

112 *On Writ of Error to the Supreme Court of the State of California.*

Supreme Court of the United States.

MILO HOADLEY, Plaintiff in Error,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, Defendant in Error.

The above-named Milo Hoadley, plaintiff in error, prays that the judgment herein complained of be reversed by the Supreme Court of the United States.

Nov. 6th, 1886.

S. W. HOLLADAY,
Att'y for Pl'ff in Error.

I, the undersigned, upon the filing of the transcript of the record in the above entitled cause, herewith and hereby enter my appearance as counsel for the above-named plaintiff in error.

S. W. HOLLADAY,
Att'y and Counsel for Pl'ff in Error,
636 *Clay St., San Francisco, Cal.*

113 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the city and county of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, 1887, pursuant to a writ of error filed in the clerk's office of the

supreme court of the State of California, wherein Milo Hoadley is plaintiff in error and you, the said City & County of San Francisco (a municipal corporation), are defendant in error, to show cause, if any there be, why the said judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert F. Morrison, chief justice of the supreme court of the State of California, this 3d day of November, A. D. 1886, and of the Independence of the United States the one hundred and eleventh.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

113½ [Endorsed:] In the Supreme Court of the United States. Filed Nov. 3, 1886. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. Milo Hoadley, plaintiff in error, *vs.* The City and County of San Francisco, defendant in error. Citation.

Service by copy of within original is hereby admitted this 3d day of November, A. D. 1886.

JOHN L. LOVE,
City & Co. Attorney, Attorney for Defendant.

114 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the hon. judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you between Milo Hoadley, who was therein plaintiff and appellant, and The City and County of San Francisco (a municipal corporation), which was therein defendant and respondent, a manifest error hath happened, to the great damage of the said Milo Hoadley, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at the Capitol, in the city of Washington, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings foresaid be[ing] inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of November, in the year

of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of California.

114½ [Endorsed:] United States. 8762. Milo Hoadley, pl'ff in error, *vs.* The City and County of San Francisco, def't in error. Writ of error. Filed Nov. 3, 1886. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

115 *Clerk's Certificate.*

In the Supreme Court of the State of California.

MILO HOADLEY, Plaintiff in Error,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, Defendant in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and fourteen pages, numbered from one to one hundred and fourteen, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 24th day of November, A. D. 1886.

[Seal Supreme Court of California.]

J. D. SPENCER, *Clerk.*
J. S. WILLIAMS, *Deputy.*

Endorsed on cover: California supreme court. No. 1312. Milo Hoadley, plaintiff in error, *vs.* The City & County of San Francisco. Filed December 20, 1886.

124-639

Original

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~1319.~~ 879

MILO HOADLEY,

Plaintiff in Error,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PLAINTIFF IN ERROR.

S. W. HOLLADAY,
Attorney for Plaintiff in Error.

In the Supreme Court

OF THE

UNITED STATES.

MILO HOADLEY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The facts of the case disclosed by the record may be stated briefly as follows:

I. This action was brought by Milo Hoadley, plaintiff in error, to quiet his title to the land described in the complaint, as against the City and County of San Francisco, defendant in error, a municipal corporation, and successor to the City of San Francisco.

II. The premises in question are within the corporate limits of the City of San Francisco, as defined by the Charter of 1851; are west of Larkin street, and are embraced within Ordinances 822 and 845, and the order of the Board of Supervisors hereinafter cited.

III. At the time of the commencement of this action, plaintiff was, and ever since the year 1850 had been, without interruption, in the actual, peaceable, adverse and exclusive possession and dominion of the property in question, claiming the same in his own right against the defendant and all the world.

IV. The acknowledged source of title to the property, is the former Mexican pueblo, to whose obligations the City of San Francisco, and still later, the present defendant, succeeded.

V. On June 20, 1855, while plaintiff was in possession, holding and claiming the property in his own right, the City of San Francisco passed an ordinance (822) containing the following sections or paragraphs:

"§ 1. It shall be the duty of the mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high water mark of the Bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the City of San Francisco, as defined in the act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit, and behoof, of the occupants or possessors thereof, according to their respective interests."

"§ 2. The City of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A.D. 1855, and to their heirs and assigns forever" (with certain exceptions which do not concern us.)

"§ 3. The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit, and behoof, of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name."

"§ 4. The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets, and sites for school-houses, city hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections."

"§ 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation; and to assess, in the manner provided by the present or any existing charter of the city, upon the lands bounded on such streets, the whole expense of laying out,

opening, grading, and constructing the same; and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance."

"§ 6. The city * * * may lay out and reserve upon the said lands * * * public squares, which shall not embrace more than one block, corresponding in size to the adjoining blocks; *provided*, that the selection shall be made within six months from the time of the passage of this ordinance; and that the city shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person."

"§ 7. The lots and lands reserved for the use of the corporation, under the provisions of the next preceding section, shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in the possession of the respective occupants as to make the apportionment as nearly equal as circumstances will admit."

"§ 8. The selection of said lands and lots shall be made by a commission, to consist of three persons, who shall be chosen by the Common Council, in joint convention, who shall report the same to the Common Council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart, respectively."

"§ 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any other outstanding title to the said lands adverse to the said possessors."

"§ 10. Application shall be made to the Legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands for the uses and purposes hereinbefore specified."

"§ 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States Land Commission for pueblo lands for the several use, benefit and behoof of the said possessors mentioned in section two, as to the lands by them so possessed, and for the proper use, benefit and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors."

VI. Between June 20th, 1855, and September 27th, 1855, the dates of the Ordinances 822 and 845 respectively, viz: On the first Monday of July, 1855, a new charter of the City of San Francisco went into effect, (paragraphs 9 complaint and answer, pp. 3 and 14, Tr.,) which by its terms expressly authorized and empowered the Common Council to confirm the title granted by Ordinance 822, just as they did.

Said charter provided:

"Sec. 65. The Common Council shall have power to confirm, dispose of, and make all needful rules and regulations respecting the title to lands or other property of the city except as hereinafter or otherwise provided by law."
Stat. of California, 1855, p. 266.

VII. On September 27th, 1855, pursuant to the above authority, the city passed a second ordinance (No. 845) which, after referring to the preceding one, enacted as follows:

"§ 3. The said Ordinance number 822, referred to in the preceding section one, is hereby reordained, ratified and confirmed in all its parts."

VIII. No selections were made of any lots or squares by the Commission mentioned in said ordinance (No. 822), nor by said city, for public uses, within six months from the passage of said Ordinance 822 by the Common Council.

IX. *The six months* from the passage of Ordinance 822 expired December 20th, 1855, and six months from the passage of Ordinance 845 expired March 27th, 1856.

X. No selections were made and reported to the Common Council, until April 19th, 1856. Some of the selections then reported for squares, including those here involved, embraced four blocks each, instead of one, as prescribed by the ordinance; and in the case of plaintiff in error, took more than one-tenth, instead of one-twentieth of the land in his possession, after laying out the streets through the same, and no compensation has ever been made or tendered plaintiff for the excess over one-twentieth.

XI. The plan and map, of said selections, when reported to the Common Council, was received by it, read, and laid over for further consideration, and never received the approval of the Common Council required by the ordinance.

XII. On October 16, 1856, the Justices of the Peace of the City and County of San Francisco, then acting as the Board of Supervisors of said City and County, passed an order as follows:

"§ 1. That the plan or map of the Western Addition reported by the Commission created under an ordinance of the last Common Council of the City of San Francisco, be adopted by this Board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnson streets."

XIII. On March 11, 1858, the Legislature of California passed an Act, embodying and reciting literally the two ordinances and the order above mentioned, and then enacted as follows:

"SEC. 1. Be it therefore enacted, that the within and before recited order and ordinances be, and the same are hereby ratified and confirmed; and all the land entered or to be entered, in the United States Land Office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to, and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an Act of Congress, entitled an Act for the relief of citizens of towns upon the public lands of the United States, under certain circumstances, approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an Act of Congress, entitled an Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes, approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of said order and ordinances, as hereinbefore recited, without further proof as fully and effectually to all intents and purposes as if they were public acts of the State Legislature."

"SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections 2 and 3 of the ordinance first above recited (No. 822), shall take effect

as fully and completely for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them [the possessors] individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof."

XIV. On July 1st, 1864, Congress passed an Act entitled "An Act to expedite the settlement of titles to lands in the State of California;" the fifth section of which reads as follows:

"SEC. 5. And be it further enacted that all the right and title of the United States to the lands within the corporate limits of the City of San Francisco, as defined in the Act incorporating said city, passed by the Legislature of the State of California, on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the *ordinances* of said city, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of the city,'" * * *

XV. On May 18, 1865, the Circuit Court of the United States for California confirmed the city's title.

XVI. This decree declares (Trans., pp. 31–2):

"This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco or other competent authority; and as to any residue, in trust for the use and benefit of the inhabitants of the city."

XVII. The cause was regularly tried in the Twelfth District Court of California, and its decision and judgment were made and rendered against the plaintiff and in favor of defendant. From this judgment plaintiff appealed to the Supreme Court of California. On July 30, 1886, said court by its final judgment affirmed said judgment of the court below, from which the present writ of error is prosecuted.

XVIII. Since the trial of this case below, a patent issued to the City and County of San Francisco in pursuance of said confirmation, as a matter of public history, though it does not appear in this record.

The foregoing are the facts of the case.

THE FEDERAL QUESTION.

"No State shall pass any law impairing the obligation of contracts."

Federal Constitution, Art. 1, Sec. 10 (Desty's Fed. Con., p. 24).

"No person * * * shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation."

5th Amendt. Fed. Con. (Desty's Fed. Con., p. 34).

The Judiciary Act provides that—

A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the *validity* of a *statute* of any State, on the ground of its being repugnant to the Constitution of the United States, and where the decision is in favor of its validity (such judgment) may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ.

(Desty's Fed. Pro., § 709).

There has been a final decision herein, in the highest Court in this State.

In this decision, was drawn in question, the validity of a statute of this State on the ground of its being repugnant to the Constitution of the United States; and the decision is in favor of its validity.

The statute whose validity is drawn in question, is that *part* of the Act of March 11th, 1858, which ratified and confirmed the order of the Board of Supervisors of October 16th, 1856, adopting the map of the City of San Francisco in respect to the "reservation of squares for public purposes," in so far as it affects the land in suit.

This is the sole question at issue in the pleadings, findings, judgment and final opinion of the Supreme Court of California now for review.

The plaintiff is the acknowledged owner of the land unless the right and title granted and confirmed to him by the ordinances were divested by that order, so ratified.

That *part* of the *order* of the Board of Supervisors "in respect to the *reservation* of squares for public purposes," is invalid, because it was intended to defeat plaintiff's title, and to impair the obligation of the contract; in this regard it is repugnant to the Constitution of the United States.

The decision is in favor of its validity.

The words of the decision are (Trans., p. 44):

"The survey and map of these squares so including four blocks each, was approved, ratified and confirmed by the Act of the 11th of March, 1858, and *from such approval*, the survey and map above mentioned *acquired validity*.

"Whatever rights the plaintiff acquired under the Van Ness Ordinance, he took subject to the Act of 1858, which approved the *survey* and *map* above mentioned. This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the Ordinance 822, allowing title to be made under it by a possession designated in it, and ratified also Ordinance 845, and the order of the Justices approving the survey and map above mentioned; and when the Act of 1858 was passed, the doctrine of relation could vest in the plaintiff no greater rights than he took under the Act of 1858. Any rights which plaintiff derived under the Act of 1858, would be subject to all its provisions. At the same time that Ordinance 822 was ratified, the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the Act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace of a contract between the plaintiff and any one, which ever vested in plaintiff any rights different from those accorded to him herein."

The whole decision rests upon this point, viz:

The *validity* of that part of the statute, confirming the order reserving squares.

This was the *one* question necessarily involved in the decision; and necessarily arose from the case itself; for there was no other issue in the case; the facts are not controverted.

The Court could not give a judgment in the case upon its merits without deciding that it involved a question of conflict with the Constitution of the United States, for the question was raised by necessary consequence from the record.

It appears by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment.

Bridge Proprietors v. *Hoboken Co.*, 1 Wall., 142–3, and cases cited.

Murdock v. *Memphis*, 20 Wall., 634.

The *opinion* of the Court may be consulted, as well as the judgment, to see what was really adjudged.

Louisville, etc., Railroad v. *Palmes*, 109 U. S., 256:

"The question we have to consider and decide is, whether in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on this point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired."

Burgess v. *Seligman*, 107 U. S., 20.

St. Bk. of Ohio, v. *Knoop*, 16 How., 391:

"But we are called in the case before us, not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment."

Murray v. *Charleston*, 96 U. S., 441.

Armstrong v. *The Treasurer of Athens Co.*, 16 Peters, 281;
Scott v. *Jones*, 5 How., 380;
Newberry v. *Ohio*, 24 How., 414;
Steims v. *Franklin*, 14 Wall., 21;
Railroads v. *Richmond*, 15 Wall., 7.

SPECIFICATION OF ERROR.

It was error for the Court to decide that that part of the Act of March 11th, 1858, *was valid*, which ratified the order of the Board of Supervisors of October 16th, 1856, adopting the plan or map of the city "in respect to the reservation of squares for public purposes," and thereby deciding that plaintiff has no title, thus impairing the obligation of the contract of grant, in Ordinance 822, in violation of Article 1, Section 10, of the Constitution of the United States.

It was error, because, under said decision, that part of the Act of 1858 took plaintiff's property without due process of law, and without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

The question under investigation here is—title.

Where is the title to this property?

All the facts necessary for the determination of this question appear in the record.

Plaintiff's status rests upon his title.

That title was vested in plaintiff and matured through the acts and omissions of the city, supported by the statutory confirmation, and based originally upon his possession.

His possession of the land was of such a character and for *such* a period of time, as brings him within the class of beneficiaries or grantees described in the second section of Ordinance 822, the first step in the series of legislative proceedings touching the title.

This fact—possession—is found by the Court in plaintiff's favor, and stands unquestioned. (Trans. p. 30.)

The second section of Ordinance 822 purports to be a *grant, presently*, to the possessors and to their heirs and assigns forever, of the entire property. (Trans. p. 25, § 2.)

The second ordinance (No. 845) declares that the *former* ordinance (No. 822) "is hereby reordained, ratified and confirmed *in all its parts.*" (Trans. p. 28, § 3.)

This Ordinance 845 was fully authorized by Sec. 65 of the Charter of 1855. (Stats. 1855, p. 266.)

In ratifying and confirming those two ordinances and the subsequent order, the Legislature, in 1858, declared them to be public statutes, as recited—that would include the date of each respectively—and specifically emphasized its intention to confirm the *grant* in the second section of No. 822, saying:

> The grant shall take effect, for the purpose of transferring the city's interest, as if deeds of the property had been executed and delivered to the possessor individually and by name, and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits and advantages which the said order and ordinances intend or *purport* to transfer or convey. (Trans., p. 29, Sec. 2.)

The foregoing Section 2 of Ordinance 822 purports to transfer and convey the entire title from the city to the possessors (plaintiff being one), and to their heirs and assigns forever.

This grant, so ratified by statute, is a contract the obligation of which is the title it vested, and this title is guarded by the full protection of the law.

Relation.

The statute, in ratifying this series of ordinances, operated to give effect *to each*, as of and from the date at which it was originally passed, so that to all intents and purposes *each* is treated in law as if it were previously authorized by competent authority.

In *Supervisors* v. *Schenck*, 5 Wall., 781, the effect of ratification is stated in the following language:

"Judge Story said there was no maxim, where it does not prejudice the rights of strangers, better settled in reason and law than *omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. And it is equally well settled that the maxim is as applicable to corporations in matters of simple contract as to other contracting parties."

This view of these ordinances has always heretofore been taken in this State as the law.

Pickett v. *Hastings*, 47 Cal., 284:

"That ordinance (822) having been ratified and confirmed by the Act of March 11, 1858, TOOK EFFECT BY RELATION as of the date of its passage" (June 20, 1855.)

And at page 287 the Court say, speaking of the effect of the Act of '58 upon the ordinance:

"It merely ratified and confirmed the ordinance, leaving it, in all respects, * * * as *it would have been* had the Common Council, at the *time* of the passage of the ordinance, possessed competent authority to dispose of the right, title or interest of the city * * * in the mode adopted by the ordinance."

Hart v. *Burnett*, 15 Cal., 610:

"The statute confirmed the ordinance *from* its *passage*, and the ordinance gave effect to a possession in January, 1855. Thus the claim under the Van Ness Ordinance had its inception, and so far as the city and county could convey the property, was made good, in 1855."

City and County v. *Beideman*, 17 Cal., 462:

"We have affirmed repeatedly and in the most solemn forms, the validity of the Act of 1858, giving effect to the so-called Van Ness Ordinance. We adhere to our conclusions upon that question."

Carlton v. *Townsend*, 28 Cal., 223:

"It has been steadily held that they" [the ordinance 822 and the act of the legislature] "vested in the possessors described in the ordinance, a title to the lands therein mentioned, as against the city, and those decisions have become a rule of property, lying at the foundation of a large portion of the titles to real estate in that city, and the rule is now upheld, not only upon principle, but upon considerations of policy, requiring certainty and stability in the rules constituting the landmarks of property."

Wolf v. *Baldwin*, 19 Cal., 315:

"The Van Ness Ordinance assures parties in 'actual possession' of land of the city on the first of January, 1855, and continued until the ordinance was introduced into the Common Council, all the right and title of the city to the lots in such possession," etc.

Valentine v. *Mahoney*, 37 Cal., 398:

"Possession, as we have already remarked, does not constitute title under the ordinance, but title passes by virtue of the grant contained in the ordinance."

Bernal v. *Lynch*, 36 Cal., 144:

"It may be conceded that all the title the city held passed to Dehon by virtue of the Van Ness Ordinance."

Payne & Dewey v. *Treadwell*, 16 Cal., 233:

The Act of 1858, confirming Ordinance 822, "is competent to validate an act already done for the disposition of this property, as well as to authorize it beforehand," etc.

This general "doctrine of relation" is recognized as the law by all the courts in the United States.

Merryman v. *Bourne*, 9 Wall., 603:

Holds, that if the Act of Congress of 1864 was necessary to the completeness and validity of the titles under the ordinance (which it questioned), "it took effect by relation" as of March 11, 1858, the date of the State's confirmation.

Seabury v. *Arthur*, 28 Cal., 150:

Holds, that the legislative confirmation of Alcalde grants has relation to their respective dates.

Landes v. *Brandt*, 10 How., 373:

A patent of 1845, upon a confirmation of 1811 of a claim filed in 1805, *by relation*, makes the title good as of 1805, so that a Sheriff's sale of 1808 passed the title to the purchaser. Citing various authorities.

Touchard v. *Crow*, 20 Cal., 160;

Viner's Abridgment, Title Relation, 290.

McCracken v. *City of S. F.*, 16 Cal., 623:

"To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given."

See also further authorities cited in that opinion.

See also *Megerle* v. *Ashe*, 33 Cal., 85;
Truchelut ads. *City Council*, 1 Nott & McCord, 136, *227;
Gibson v. *Hibbard*, 13 Mich., 217;
State v. *Norwood*, 12 Md., 206;
S. P. R. R. v. *Dull*, 4 West Coast R., 639, 643.

In the case at bar, the controversy is between the original parties to the transaction, and no rights of strangers have intervened.

PLAINTIFF'S POSITION IS:

First: That the rules of property in this State are fully settled in our favor on this point, by a complete series of adjudications. That the uniform current of decisions in this State has been in conflict with the judgment here complained of. That prior to this action, the title which we here assert, has never been denied.

Secondly: That in the State of California the common law then was, and is, adopted as the rule of decision, in the Courts of this State (Stats. Cal., Vol. 1, p. 219); and that the private rights here asserted, are to be determined by the application of common law rules alone.

Chicago v. *Robbins*, 2 Black, 428:

"Where the rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Court. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

The laws which exist at the time and place of the making of a contract enter into and form a part of it.

Defendant's Position.

The defendant, the City and County of San Francisco, successor to the pueblo and city, contends that plaintiff has no title, by any or all of the foregoing legislative acts, municipal and State, because, as they say, in October, 1856, the city dedicated these premises to public use, by the order of that date, which appears in this record, adopting a map and declaring it to be the plan of the city, as to streets and reservation of squares; which order being ratified, reserved the land to the city, thus defeating plaintiff's title and dedicating the land to public uses.

This position is untenable.

The city had the *right*, under the ordinance, to lay out and open *streets* through the granted premises, without limit as to quantity; and as to time, "as soon as the corporation may deem it expedient, and without compensation." (See § 5, of Ordinance 822, Trans., p. 26.)

The matter of streets stands acknowledged and unquestioned by plaintiff; it has never been a subject of controversy. But the provision in the ordinance respecting these squares, is an independent provision; in a separate section (Section 6), a right limited carefully, as to time, quantity, mode of selection and compensation to the possessors, thus recognizing *their* rights in the premises.

Therefore, let it not be supposed that our argument or our position militates against the plan of the city as to streets contemplated in the Act; for that was strictly legal.

But in so far as the order undertook to take the property of plaintiff for public squares, without compensation, *it is void*, and could not be made valid by ratification or otherwise, without his consent.

The city's right to lay out and reserve *squares* upon said land is carefully limited by Section 6 of Ordinance 822: as to size, one block; time, six months; extent, 1-20 of any one man's land; as to mode—by the Commissioners, whose selections were to be finally approved by the Common Council before they became effective or deeds could be demanded from the possessors. (Trans., p. 27, § 6.)

THE GRANT IS IN PRESENTI.

Ordinance 822 is a present grant of the whole property, passing the title from the city to the possessors. (Trans., p. 25, § 2.)

Congressional grants to railroad companies take effect from the date of the Act, though the land is not located till long afterwards.

R. R. Co. v. *Baldwin*, 103 U. S., 426.

The grant was burdened with a condition subsequent of a right in the city, grantor, to get back a limited quantity within a limited time, and in a particular manner. (Trans., p. 26, §§ 5 and 6.)

Until the steps were taken by the grantor to effectuate this right, within the time limited and in the mode prescribed, the whole title remained in the possessors.

No report of selections for squares was made till April 19, 1856. (Trans., p. 36.) The six months limit expired December 20, 1855. The report and map were never approved by the Common Council, but were "laid over for further consideration." (Trans., p. 35.) The Common Council never proceeded further towards approval of the selections.

The findings show that the city *never exercised* this right. The time *lapsed.* And *time* was of the essence of the contract.

The title became *forever discharged* from the condition, and remained vested in the grantee, a perfect title.

Kent's Comm., Vol. 4, *129:

"Conditions subsequent are *not favored in law*, and are construed strictly, because they tend to destroy estates, and the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience."

*130:

"If the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law or of *the grantor*,

* * * the estate of the grantee being once vested is not thereby divested, but becomes absolute," etc.

*144:

"Such conditional sales or defeasable purchases, though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers, and the *time limited* for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost."

Holmes v. *Grant*, 8 Paige, 243:

"A court of equity will never lend its aid * * * to relieve the grantor who neglects to perform the condition on which the privilege of repurchasing depends."

Davis v. *Thomas*, 1 Russ. & M., 506:

Vested interests are favored by Courts as against such construction as will leave doubt or uncertainty on the title.

Roper on Legacies, Vol. 1, p. 618:

"It is the doctrine of Lord Alvanley upon this subject, that where there are clear words of gift, creating a vested interest, the Court will never permit the absolute gift to be defeated, unless it be perfectly clear that the very case has happened in which it is declared that the interest shall not arise."

Ferris v. *Coover*, 10 Cal., 614, 615.

(A grant with conditions subsequent):

"The words of the instrument are plain; they import a conveyance of the land in full property."

Sheppard's Touchstone, p. 138:

"If the condition be made in the copulative, and consist of divers parts, every part must be observed, or the condition will not be performed."

On October 16th, 1856, long *after* the six months had expired, and after the city's right to select or lay out *any* squares on the granted premises had lapsed, and when the title had become *absolute* in the possessors, freed from all conditions, the order in question was passed with intent first, to adopt a plan of the city as to *streets;* and second, to reserve and dedicate *squares* out of the granted premises. (Trans., p. 28—bottom.)

As to the streets, it has never been disputed. It was a clear right, according to the terms of the ordinance.

As to squares, the order was a violation of private property.

The State statute of 1858, which ratified the two ordinances and the order in question, in terms, gave to each the dignity and effect of "public acts of the State Legislature;" making each effective as of its *date*, as a State statute.

Ordinance 822, dated June 20th, 1855, "hereby relinquishes and grants all the right and claim of the city to the lands" in question to plaintiff. (Trans., p. 25, § 2.)

Ordinance 845, dated September 27, 1855, hereby reordains, ratifies and confirms in all its parts the Ordinance 822. (Trans., p. 28, § 3.)

These two ordinances, so ratified and confirmed, passed the title from the city to the plaintiff.

That the title vested in plaintiff by § 2 is manifest by the express terms of § 8 of Ordinance 822, which required *deeds* from the possessors to the city, for the lands so selected, as the *only* means of reinvesting the city with that title. (Trans., p. 27, § 8.)

Such deeds could only be required for selections made within six months from the date of the ordinance, "and upon such *approval*" by the Common Council.

It is obvious that until the title should be reconveyed to the city, according to the provisions of the ordinance, *that title* remained *vested* in the possessors.

Neither statute nor ordinance provides any other mode of depriving plaintiff of this title.

The title, so vested, was burdened by a condition subsequent, to be performed, if at all, by the grantor, strictly within the terms prescribed. (Trans., p. 27, § 6.)

This right to select was limited to six months' time.

It is, in its nature, a contract for a repurchase.

"The time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost."

4 Kent's Comm., *144.

It is found as a fact, by the Court below, that *no selections* were made within six months after the passage of the ordinance. (Trans., p. 36.)

Thus the right reserved by the limitation lapsed; and having lapsed, was lost forever.

The *title* was left in the plaintiff, discharged from the condition; a perfect estate.

This was the state of the title—so vested in plaintiff—when the Board of Supervisors passed the order adopting the map selecting this land for public squares.

Passing the question whether title to land can be divested by adopting a map—we only know that on this map this land was marked as a square.

This order adopting the map, was also ratified by the statute of March 11, 1858, and from such ratification took its force. (Trans., p. 29, § 1.)

The Supreme Court of this State has decided that *because* this order was ratified at the same time with the ordinances of grant, that thereby the grant to plaintiff was defeated. (Trans., p. 44.)

But, through the doctrine of relation, each one of these acts ratified became valid and took effect *as of its date.*

Therefore, the grant having vested and matured a perfect estate in plaintiff *before* the date of the order, such order could not take effect without defeating and destroying this estate, and impairing the obligation of the contract.

The Grant was a Contract.

The grant in Ordinance 822 was a contract, and, as such, was reiterated in Ordinance 845; and both receiving the statutory confirmation, were made respectively public acts of the State Legislature,—they became effective and vested the title as of June 20, 1855.

This contract was between the possessors on the one part and the city on the other—the present parties.

It was for *valuable consideration* from each—from the city, the release of its claim to the possessors—and from the possessor, not only the covenant to give back land for squares

if taken in the way and to the extent provided, but also to yield land for *streets at any time* and to any extent; and moreover, to become liable for the *whole expense* of laying out, opening, grading and constructing such streets. (Trans., p. 26, § 5.) Such liability was, in effect, a covenant on the part of the possessor that he would pay such expenses.

Holladay v. *Frisbie*, 15 Cal., 635;

People ex rel Fountain v. *Supervisors*, 4 Barb., 79.

That such a legislative act is a contract is firmly settled law.

People v. *Bond*, 10 Cal., 571–2.

Fletcher v. *Peck*, 6 Cranch., 87, *137:

"A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant."

St. Bk. of Ohio v. *Knoop*, 16 How., 385:

"In the case of the *State of New Jersey* v. *Wilson*, 7 Cranch., 164, it was held, 'that a legislative act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act.'" (See also p. 389).

Ohio Life Ins. Co. v. *Debolt*, 16 How., 429.

Westervelt v. *Gregg*, 12 N. Y., 212:

* * * "but no power in the State can legally confer upon one person or class of persons the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer."

The obligation of this contract was, that the grantor would not re-assert title to the land except and in the mode prescribed by the ordinance.

In this title plaintiff must be protected: and the city is under obligation not to meddle with it.

"Where a private right is asserted, the government is as impotent as the humblest citizen to impair or destroy it."

McCauley v. *Weller*, 12 Cal., 532–3.

"The State can claim no greater exemption than an individual, from the usual consequences of an unwise and impolitic contract."

State v. *McCauley*, 15 Cal., 457.

There is no interest in civilized society so vital to the principles of popular liberty as the strict adherence to the settled rules of law.

Yet under the decision appealed from, this title has been defeated, the obligation of the contract has been impaired—impaired by a statute of this State—as construed by its Supreme Court—the obligation of the contract has been extinguished.

In *Furman* v. *Nicol*, 8 Wallace, 58, was presented a question much like the one at bar. In that case the Court said:

"The defense really amounts to this: either that the alleged contract did not exist, or, if it did, that there has been no legislation that impairs it. Whether it be true or false depends on the construction to be given the laws of the State which are claimed as proving the making of the contract and its violation. If so, this Court decides for itself whether the construction which the Court below gave to these different statutes was correct or incorrect; and we are required to reverse under the twenty-fifth Section of the Judiciary Act if we find that under an error of construction, that Court has adjudged that no contract has been impaired.

"To do otherwise, would be to surrender to the State courts an important trust confided to this Court by the Constitution. Without pursuing the subject further, it is clear from the record that the Supreme Court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff Furman claimed authorized him to make the tender to the clerk of the notes of the bank of Tennessee. The jurisdiction of this Court is therefore complete, and the case must be decided on its merits."

In the case at bar the Supreme Court of California, in reaching its conclusion, not only necessarily, but explicitly adjudged that there never existed such a contract as was claimed on the part of Hoadley under the Ordinance 822, ratified and confirmed by the Legislature; and that the title to the property in question did not pass to him by the Ordinances ratified and confirmed as stated.

When the selections were made the city took squares of four blocks instead of one, and instead of taking but one-twentieth of plaintiff's land, took more than one-tenth, and no compensation was ever made or tendered. (Trans., p. 36.)

The contract was impaired, within the meaning of the Constitution, as effectively by the taking of more than one-twentieth of plaintiff's land without compensation, as if the whole had been taken: as was held by the Court in *People* v. *Platt*, 17 Johnson, *215, saying:

> "The principle adopted by the Supreme Court of the United States extends as fully to a case where a material and essential *part* of the grant is impaired as to a case where it is entirely impaired."

STATUTE OF 1858 EMBRACES INDEPENDENT PROVISIONS—SOME VALID, SOME INVALID.

The two parts of the Act of 1858 tend to two different purposes or ends, independent of one another.

The primary and main purpose of the Act is to declare, by—

> "SEC. 2. That the grant or relinquishment of title, made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited (822), shall take effect," etc.

While the other and subordinate part was, "in respect to * * * reservation of squares for public purposes."

We claim the latter part unconstitutional and void, yet it does not prevent the former part from being fully valid and binding, for the two parts deal with two different purposes and are independent of, and as construed, inconsistent with one another.

A part of a statute may be in conflict with some constitutional provision and therefore void, while the balance would be valid and binding.

Cooley's Con. Lim., p. *177–8, and cases cited;
People v. *McCann*, 16 N. Y., 61;
People v. *Hill*, 7 Cal., 103;
Robinson v. *Bidwell*, 22 Cal., 386, and cases cited;
Woodruff v. *Trapnall*, 10 How., 206.

"But if an independent provision, not in its nature and connection essential to the other parts of the statute, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid."

French v. *Teschemacher*, 24 Cal., 536;
Meshmier v. *The State*, 11 Indiana, 485;
Fisher v. *McGerr*, 1 Gray (Mass.), 21-22;
Houghton v. *Austin*, 47 Cal., 646-7.

To *give* and to *take*, at the same time and in the same breath, is as impossible as to create and destroy by the same act.

The fact that the grant which conferred the estate and the selection which attempts to defeat it, are both recited in and ratified by the same statute, cannot be urged as a reason for preserving the vicious portion of that statute from attack.

For one statute is often made up of many parts and may purport to effect many ends: but if any one of them be repugnant to the settled rules of property and law, it fails, without affecting the remainder. One portion of this statute ratified a grant and all the rules of law combined to shape that grant into a perfect, vested title.

The other portion, as construed by the Court below, effects to extinguish the title so vested.

The Legislature, having ratified the grant, had then, no power to destroy the title which the grant conferred.

So here, while protesting against the latter part as void; we rest upon the *grant* as valid, and on it found our rights.

The Charter of 1855 Authorized Ordinance 845.

It appears from the complaint and answer both (paragraph 33) that Ordinance 845 was passed under the charter of 1855, the sixty-fifth section of which reads:

"Sec. 65. The Common Council shall have *power to confirm, dispose* of and make all needful rules and regulations respecting the *title to lands* or other property *of the city*, except as hereinafter or otherwise provided by law."

Trans., p. 8, XXXIII, and p. 14, Sec. 9;
Cal. Stat., 1855, p. 266.

The exception does not control this express power.

It was under this power that Ordinance 845 ratified and confirmed 822 in all its parts.

Source of the Title.

The city's title comes from the confirmed pueblo claim, or from the grant in the fifth section of the Act of Congress of July 1, 1864, printed in the 39th paragraph of the complaint. (Stats. at Large, Vol. 13, p. 332, Sec. 5.)

We think the pueblo title the true title, but it is unimportant from which source the title is derived, for the Act of Congress of July 1, 1864, recognizes the city as having the power to convey, and its ordinances as conveyances, and confirms the conveyances thus made. The ordinances are specially mentioned in the Act of Congress, but the order of the Board of Supervisors is not referred to in that Act.

In Conclusion.

This writ is taken from a final judgment in the highest Court of this State.

Here is drawn in question, the validity of a statute of this State, on the ground of its being repugnant to the Constitution of the United States.

The decision is in favor of its validity.

This question of the validity of the statute, was the only question in the case; and plaintiff asks a judgment of this Honorable Court, adjudging that part of the statute of March 11th, 1858, which confirms the *selection* of plaintiff's property for public *squares*, to be null and void, and reversing the judgment of the Supreme Court of the State of California.

Respectfully submitted.

S. W. HOLLADAY,
Attorney for Plaintiff in Error.

JOHN CURREY,
W. C. BELCHER,
Of Counsel.

San Francisco, June 30th, 1887.

Service of a copy of the within brief is hereby admitted this 30th Day of June 1887

Geo. F. Henry
Solicitor for Appellee

John B. Allen
Counsel for Appellee

Geo. F. Henry Jr.
Solicitor for Appellee

No. 1519.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

Milo Hoadley,

Plaintiff in Error,

vs.

The City and County of San Francisco,

Defendant in Error.

In Error to the Supreme Court of the State of California.

Brief for Defendant in Error.

GEORGE FLOURNOY, Jr.

Attorney for Defendant in Error.

[illegible] FLOURNOY, Sr., and

[illegible]

Special Counsel.

Filed this [illegible] day of [illegible] 1887.

[illegible], Clerk.

By [illegible], Deputy Clerk.

[illegible]

IN THE SUPREME COURT

OF THE

UNITED STATES.

MILO HOADLEY,
Plaintiff in Error,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

Brief for Defendant in Error.

The plaintiff in error claims the premises under a title derived directly and immediately from the defendant in error, and alleges as his muniments of title the City Ordinance No. 822 and the Legislative Act of March 11, 1858, reciting and authorizing that ordinance.

This admits the title to have been at one time in the defendant in error, and presented to the Court below the sole issue—whether or not that title had been transferred by the Ordinance and Act mentioned. That is to say, the Court was called upon to construe a conveyance and did so against the plaintiff in error.

"No Federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the City of San Jose, and the question to be determined was which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. Even if it depended upon the treaty of Guadalupe Hidalgo and the several Acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it."

Romie et al. *vs.* Casanova, 91 U. S., 379.

"* * * The real controversy was as to the transfer of that title (city title) to the plaintiffs in error; and this did not depend upon the 'Constitution or any treaty or statute of, or Commission held, or authority exercised, under the United States.'"

Hammond et al. *vs.* Mason etc., 92 U. S., 724.

In the case at bar the title *to* the city is not questioned, but the "real controversy is as to the transfer of that title." And does not, we believe, present a Federal question.

Had, however, the decision gone against the defendant in error the case would have been different, because the defendant in error derived its title from the United States under the Federal Act of July 1, 1864, upon trusts prohibiting the alienation of its public squares, of which the premises in question constitute a part. A conveyance, therefore, of this property to plaintiff in error would have been in violation of the Federal Act, and made a decision sustaining such a conveyance in the form of either, an Act, Ordinance, judgment or deed, reviewable here.

The first error against the judgment, if well assigned, would place the Court below in a most embarrassing dilemma. For it seems that plaintiff in error relies upon Sec. 2 of Ordinance 822 as ratified by the Legislative Act of March 11, 1858, while defendant in error relies upon Sec. 4 of the same Ordinance as ratified by the same Act for the reservation.

Now, Sec. 4 is at least as operative as Sec. 2, to vest a right, and it would appear that had judgment gone against defendant in error it would have had a good assignment on the same ground as that which the plaintiff in error has taken. That is to say, which ever way the Court might have decided it would have committed a fatal error! Such a conclusion, however illogical, necessarily follows if this assignment of error is good.

The second, third and fourth assignments are based on the assumption (arising from a mistaken construction of Ordinance 822) that the city contracted absolutely to convey to plaintiff in error, as a party in possession, these public squares. We do not at all assent to this construction of the Ordinance; and if such a contract had been entered into and executed by delivering proper deeds both the contract and deeds would have been void.

Palmer *vs.* Lowe, 98 U. S., 16.
Townsend *vs.* Greeley, 5 Wal., 326.
The Pueblo Cases, 4 Sawyer, 554.
San Francisco *vs.* Canavan, 42 Cal., 541.

In disposing of her pueblo lands the city was entirely under the control of the Federal Government, as the source of title, and could neither, of her own will, legally agree to sell and convey to plaintiff in error, or set off as squares any particuticular tract or tracts, and all her contracts of that nature, and dealings with the pueblo lands, prior to the Federal Act of July 1, 1864, were made subject to be defeated by the holder of the title.

These premises, Hamilton Square and Alta Plaza, were designated as public squares by the Van Ness map and Ordinance, prior to 1858. Such a designation may have even been a wrong upon plaintiff in error, but afterwards when the Federal

Government conveyed these lands to the city by the Act of 1864, one of the conditions was that they should be forever used as public squares. Now, whether the original dedication was right or wrong, legal or illegal, cuts no figure, because the Federal Government had the power to impose the condition, and the city cannot actively or passively extinguish it.

Montgomery *vs.* Beram, 1 San, 613.
Grisar *vs.* McDowell, 6 Wal., 363.
Hoadley *vs.* San Francisco, 50 Cal.. 275.

On page 8 of his brief, the attorney for plaintiff in error says "the plaintiff is the acknowledged owner of the land, unless the right and title granted and confirmed to him by the Ordinances were divested by that order so ratified."

We do not think that a correct statement of the situation by any means. He should rather have said: "The defendant is the owner, unless the plaintiff has shown a conveyance or transfer of some kind." The facts to which that statement apply are simple enough—the second section of Ordinance 822 grants to possessors, the fourth section reserves the squares, even though occupied. This was clearly not a grant to plaintiff of the squares, under any possible possession thereof.

It is true other sections of the Ordinance contained provisions as to the time when the squares

should be selected, the size of the proposed squares and the quantity of land which could be taken from any possessor without compensation therefor.

In reference to these provisions it is said: "Whatever rights the plaintiff acquired under the Van Ness Ordinance (822) he took subject to the Act of 1858, which approved the survey and map above mentioned." (Transcript, p. 44.)

It seems to be established:

1st. That the legal title to these squares was transferred from the General Government to the City and County of San Francisco.

2d. That the instrument of transfer was the Congressional Act of July 1st, 1864.

3d. That that instrument contained as trusts imposed upon the grantee and running with the title the obligation of holding and using these squares perpetually for the beneficiary named.

4th. That neither the trustee or *cestui qui* trust, severally or jointly, can extinguish the trust without the grantors consent.

5th. That the defendant in error has not and cannot divest itself of title to these squares.

6th. That plaintiff's possession thereof was tortious, from which no right or title to the property could spring.

7th. That the defendant in error yet holds the legal title to the premises, and is charged with the execution of the trusts as originally imposed.

Respectfully submitted.

GEO. FLOURNOY AND
J. B. MHOON,
Special Counsel for Defendant in Error.

GEO. FLOURNOY, JR.,
Attorney for Defendant in Error.

124-639

Original

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1312.

MILO HOADLEY,

Plaintiff in Error.

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PLAINTIFF'S REPLY TO THE BRIEF FOR DEFENDANT IN ERROR.

S. W. HOLLADAY,
Attorney for Plaintiff in Error.

In the Supreme Court

OF THE

UNITED STATES.

MILO HOADLEY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
DEFENDANT IN ERROR.

Plaintiff's Reply to the Brief for Defendant in Error.

[NOTE.—As the parties occupy the same relative position to each other in this Court as they did in the Court below, we shall for the sake of brevity and convenience, refer to them simply as plaintiff and defendant. "Plaintiff" meaning Milo Hoadley, and "defendant" meaning the City and County of San Francisco, defendant below and defendant in error here.]

We now undertake on behalf of plaintiff, to correct some of the statements in defendant's brief, to state some of the positions wherein the plaintiff and defendant agree; to criticise and combat some of the positions assumed for plaintiff by defendant, and to prove them erroneous; to prove that the "Federal question" is sharply presented in this case, and to prove that the State statute, which the decision upholds, impairs the obligation of a contract; to show that this decision is contrary to the principles of all the preceding decisions of the same Court, and subverts the well settled

rules of law and property as recognized in our State Courts, from the birth of the State down to the decision complained of; and finally, to show that defendant's brief is based on a misapprehension of the case.

It is true, as asserted in the opening of defendant's brief, that plaintiff claims the premises under title derived directly and immediately from defendant, and that the muniments of plaintiff's title are the City Ordinance 822 and the legislative Act of 1858 reciting and authorizing that ordinance, which admits the title to have been at one time in the defendant (the city).

In all this we agree with defendant. But it is only a *part* of the case.

We claim also and further under the *second ordinance* (845), which reordained and ratified the first (822); and *both* attached to PLAINTIFF'S POSSESSION of the land at the time they were respectively passed. These ordinances were *both* ratified and confirmed by the Legislature in 1858.

Defendant's counsel in their brief (page 3) say that our "first error against the judgment, if well assigned, would place the court below in a most embarrassing dilemma."

We think the first error well assigned; and if such shall be the consequences, it will not be our fault.

It is quite true, as defendant's brief says, that plaintiff "relies upon Section 2 of Ordinance 822 as ratified by the legislative Act of March 11, 1858"—for that contains the grant to plaintiff—and they add to the above that "defendant relies upon Section 4 of the same ordinance, as ratified by the same Act, for the reservation." (Sec. 4, at p. 26, Trans.)

If defendant relies upon Section 4, the question naturally follows, what part of Section 4 is that reliance based upon?

Section 4 purports to do two things, viz:

"§ 4. The city, however, * * * reserves to itself all the lots which it *now occupies*, or *has already* set apart for public squares; * * *

"And also such lots and lands as may be selected and reserved for streets and other public purposes under the *provisions* of the *next succeeding* sections."

The city cannot rely upon the *first* of these, because avowedly, these lands were *not* among the lands then occupied or "already set apart for public squares."

For, in June, 1855, when the first ordinance was passed, the city survey and map extended as far west as Larkin street, and no further; upon which map appeared four public squares, namely: Portsmouth Square, bounded by Washington, Kearny, Clay and Dupont streets; also, Washington Square, bounded by Filbert, Stockton, Union and Powell streets; also, Union Square, bounded by Post, Stockton, Geary and Powell streets.

These squares the city had already set apart and was actually occupying as public squares at the date of the ordinance.

They are the squares referred to in the first part of Section 4, spoken of in defendant's brief. Those squares are not questioned herein.

But west of Larkin street the city survey and map did not extend when the ordinance passed, in June, 1855.

The squares in question were *first created* by the map in 1856.

Therefore, the city must rely upon the second part of Section 4, which devolves upon her the necessity of showing explicitly, that these alleged squares *were* reserved "under the provisions of the next succeeding sections," which has most signally failed.

The squares in question are among those contemplated in the *latter part* of said Section 4, as a part of "such lots and lands as *may be selected and reserved* for streets and other public purposes [such as squares] *under the provisions of the next succeeding sections.*"

"The next succeeding sections" are 5 and 6:

"SEC. 5. The city shall have the *right* to proceed to lay out and open streets as soon as the corporation may deem it expedient, in that part of the city *west of Larkin street,*" etc. (No limit as to time or quantity of land.)

"SEC. 6. The city shall also *have the right* to select and set apart from the lands west of Larkin street * * * lots

for the use of the corporation; and may lay out and reserve upon the said lands, public squares, which *shall not embrace* more than *one* block, corresponding in size to the adjoining blocks; *provided*, that the selection shall be made within *six months* from the time of the passage of this ordinance; and that the city *shall not*, without due compensation, occupy for the purposes mentioned in *this section*, after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person."

Such are the conditions subsequent which incumber the city's "right to select"—they were attached to the grant by the city itself.

These conditions are all made valid "as hereinbefore recited" by legislative ratification.

These conditions were confessedly never observed or performed by the grantor; the findings say so.

The ratification of the conditions subsequent, unperformed, is a ratification of the grantor's disability to claim the benefit of the "right to select" anything after six months; for the *right* to select was limited, as to time, quantity of land to be taken and size of squares, "under the provisions" of Sections 5 and 6.

In the face of these facts, defendant's counsel, in their brief, page 3, say that "defendant in error relies on Section 4 of the same ordinance, as ratified by the same Act, for the reservation."

In other words, they rely on conditions subsequent in the grant, to be performed by the grantor after the title had vested, the conditions unperformed,—the grant so ratified in terms,—they rely on this to take the title from the grantee.

Defendant's counsel say that "Section 4 is, at least, as operative as Section 2 to vest a right."

The difference, as we understand it, is that by Section 2 the city divests herself of the title and vests it in plaintiff; while by Section 4 the city reserves a privilege to get back a limited part of the granted premises, on certain conditions, which privilege the grantor never exercised.

The Act of Congress.

We submit, that the Act of Congress of July 1, 1864, is not a material factor in the case, for these reasons:

The city preferred her claim of title to the land before the United States Commission, in 1852; the claim was finally recognized and confirmed by the United States Circuit Court, in 1865, upon which a patent afterwards issued to the city. The confirmation and patent related back to 1852, the date of filing the claim. Thus we prove that Hoadley's grantor had title to the land in 1855, when the city passed the first ordinance.

In their brief, page 2, defendant's attorneys admit that "in the case at bar the title *to* the city is not questioned."

And yet in the same brief, page 4, we find the counsel saying that she had *no* title to deal with until the Act of Congress, in 1864.

There is a strange inconsistency in these two statements.

We contend that the city had the title to this land (through the doctrine of relation) in 1855, and even back to 1852, the date of the filing of her claim before the Land Commission for the pueblo lands, of which these premises were a part—which claim was finally confirmed—"in trust for the benefit of the lot-holders under grants from the pueblo town or City of San Francisco." (Trans., 31–2.)

The Act of Congress of July 1, 1864, is in its nature a quitclaim of title by the Government to "said city and its *successors*, for the uses and purposes specified in the ordinances of said city,"—i. e., 822 and 845 (page 6 of our former brief.)

The title being in the city in 1852, as shown by her claim confirmed by the Government, Congress had nothing to give by the Act of 1864, and the Act is immaterial; but if that Act gave any title, it simply fed the ordinances; for it professes to relinquish and grant the right and title of the United States to these lands to the *city and its successors* for the uses and purposes specified in the ordinances in question; thus, in effect, acquiescing in what had been already done by the city and State.

Upon this writ of error, we present no question arising under the construction of that Act, but we rely entirely upon the State statute passed in confirmation of the ordinance of grant; since the Act of Congress passed the title of the United States into the channel of the confirmed ordinance and lodged that title wherever the ordinance effected to vest it.

Hoadley v. *San Francisco*, 4 Otto, 5.

There is nothing in the Act to warrant the assertion of defendant's counsel (page 5) that—

"One of the conditions was that those lands should be forever used as public squares."

Congress has no control of our municipal affairs, and does not profess to interfere with the matter of our public squares in the Act of 1864, as counsel seem to suppose.

Defendant's argument and authorities seem to us irrelevant to the question, and we leave them without further comment.

The ordinances having been ratified by competent authority, stand as valid acts of legislation and contract, *as of their respective dates*, the same as if the city had had prior authority to pass them, just as she did.

Moreover, the statute declares, after ratifying them, that "it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances *as hereinbefore recited*, without further proof, as fully and effectually to all intents and purposes, as if they were public acts of the State Legislature."

Does not that language include the *dates* of the respective ordinances—they bear date the year before the order? Is the date no part of the ordinance?

The same statute which ratified the ordinances went further and specifically declared:

1st. That the "*grant*," in paragraph 2 of Ordinance 822, "shall take effect" to *transfer* the city's *title* to the possessor.

2d. It gave those ordinances, as recited in the statute, the full dignity of "public Acts of the State Legislature."

3d. It clothed the *possessors* with "all the interest, title, etc., which the said ordinances *purport* to transfer or convey."

The *findings*, which stand as a special verdict, all in favor of plaintiff, show him to be such a *possessor* of this land, as the ordinance contemplated to be necessary to make him one of its grantees or beneficiaries.

This stands unquestioned.

Plaintiff's title, then, comes from both the ratified ordinances, operating on plaintiff's possession. Taken together, they make a grant *in presenti* of the title.

The ordinances, made effective by their ratification, vested the title in the grantees, the possessors, June 20, 1855.

The order, if made effective to reserve these lands, by the like ratification destroyed our title thus vested, the next year, to wit: October 16, 1856.

Had each ordinance respectively been confirmed in 1855 as they were in 1858; and had the order taking plaintiff's land for a public square been confirmed in 1856 instead of 1858—would any lawyer contend that the order going to destroy the vested title was valid? Is the legal effect of the *ratification* of both the ordinances and the order in one statute different from what it would have been, had the same language of ratification been employed in three separate statutes immediately following the passage of each respective ordinance and the order?

The Federal Question.

We devote the rest of this brief to a showing of the "Federal question."

The Constitution of the United States provides that no State shall pass any law impairing the obligation of contracts.

Therefore, where a State *has* passed such a law, it is repugnant to the Constitution.

The Federal Statute reads, that a writ of error will lie to this Hon. Court from any decision of the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. (Desty Fed. Pro., § 709.)

Therefore, when we have shown that in this case there is drawn in question the validity of a part of a State statute, on the ground that it impairs the obligation of a contract and destroys a title vested by the contract (though that contract be also through a statute and a portion of the *same* statute), and the decision is *in favor* of the validity of such part, we have made out a "Federal question," and the jurisdiction of this Court is complete.

We have said that plaintiff derives title from the city as his immediate grantor; that such title was, through certain ordinances of the city, ratified by State statute.

And we have shown the Act of Congress of July 1st, 1864, relinquishing the claim of the United States to the city and its successors for the uses and purposes specified in said ordinances.

Yet we do not thereby present any question arising under this Act of Congress. The *question* is, as to a ratified grant, and a statute going to destroy that grant.

Conceding the title to have been in the city down to the passage of Ordinance 822, let us regard all the events which occurred, and *follow the title* down to the inception of this action, and find where it is *now*. For it is a matter of *title* at last.

Beginning, then, with Ordinance 822, we see it *purported* to be a grant *in presenti* of the entire title of the city to the possessors.

Hoadley was the possessor of this land, so the *purport* of that ordinance was to vest the title in Hoadley.

We have said the "entire title;" still it will be seen that the ordinance contained a provision by which the *city* might select limited portions, provided that the selection should be made *within six months* from its date. This was, in its nature, a condition subsequent—to be performed, if at all, by the grantor—a condition for a repurchase. Its purpose was to provide a means to reinvest the city with the title to the limited portions properly selected; for the provision read that the holders of the parts so selected should make and deliver *deeds* to the city for such parts, in order to reconvey the title.

It is contended and admitted that thus far the acts of the city, including the ordinance and the condition, were *ultra vires*, from the fact that at that time the city had no power to alienate its lands. But the subsequent Act of the Legislature, in 1858, specifically ratified this ordinance, after reciting it literally, and this statutory ratification operates to give it full validity and effect at and from its date.

Therefore, we regard Ordinance 822 as fully valid and effective from its date—June 20, 1855.

The question follows: How did it affect the *title?*

The words of the ordinance were: "The city hereby relinquishes and grants." Hoadley was an acknowledged grantee.

Therefore, the title to this land thereby became *vested* in *him*—not absolutely, to be sure—but subject to be divested in part only through the performance of the condition subsequent by the city, grantor.

If this condition subsequent had been duly performed, the title might have been reinvested in the city as to the parts selected; if not, it *remains* in Hoadley.

Let us see whether it was performed.

The time of performance was *limited* to selection within six months.

No selection was made within six months, and the city *never* selected "under the provisions" of the ordinance.

What was the result of this?

The condition subsequent lapsed. The city then lost its right to select at all.

As a result, the *title* remained—as it was—vested in Hoadley, and became a perfect estate in him.

Thus far, we see Hoadley *vested* with a perfect title to this land—a fee simple absolute—six months aftewards, to wit: December 20, 1855.

This consummation took its force from the fact that this ordinance was subsequently confirmed and ratified *in toto* by the State statute.

The ordinance and statute then, perfected the grant of the land.

This grant was a *contract* with Hoadley—and a contract not without consideration—for by the terms of the ordinance, when he accepted its grant, he undertook to pay all the expenses of opening, grading and laying out the streets through the granted premises, and *this* was a valuable and very onerous consideration.

Hoadley's *title*, therefore, is vested through this contract, and under the Federal Constitution no State can pass a law to impair the *obligation* of that contract.

The next move of the city after Ordinance 822, was to pass Ordinance 845, which was in confirmation of 822. This was done in view of the fact, that after the passage of the first ordinance, and before the passage of the second, the city had been granted a new charter which gave her power to "confirm and dispose of the title to" this land, so that what was considered *ultra vires* in the first ordinance was confirmed and made effective in the second.

But even without availing ourselves directly of this new power in the city, and granting for the purpose of this argument that such ordinance (845) was also *ultra vires*, we look again to the Statute of 1858, and find this ordinance literally ratified therein. The effect of this was to strengthen Hoadley's grant and contract, and more effectively if possible vest the perfect title in him.

Thus far the title is traced into Hoadley absolutely.

Thus far all the city's acts went to *vest* the *title* in him, and none to divest it.

No selections had been made within the six months. But nearly ten months afterwards a selection was made by the Commissioners, and reported to the Common Council for its approval.

Even had such selection been then *approved*, it would have been of no avail, because the city's right to select had then been lost.

However, it was *not* approved, but, on the contrary, rejected by the Common Council, thus losing whatever character as a selection it might before have had.

Thus far, the city had become divested of the title; the condition subsequent had been lost, and afterwards a feeble and vain attempt had been made to select, which had failed.

Where was the title then? In Hoadley, pure and simple.

The next step of the city was by its Board of Supervisors, in taking up this map of selection—once rejected—and simply *adopting it*—October 16, 1856—adopting it as the plan of the city in respect to the location and dimensions of streets and avenues, and the reservation of squares and lots for public purposes.

By way of parenthesis, we may as well insert here, that as far as the plan of the city went "in respect to the location and dimension of streets and avenues," we do not question it. Because, by the terms of the granting ordinance (822) the city's right to lay out streets through the granted premises was not limited to six months or to any other time specified; but could be done "as soon as the corporation may deem it expedient."

But, in so far as the order went to the selection and reservation of *squares*, it was totally and necessarily *void:*—void, because the *perfect title* was in Hoadley—beyond the reach of the city. The city had then no right to meddle with *his* title; and when she did meddle with it, her acts gave her no rights and were simply void, for she was interfering with private property.

The ordinances concerned the *title* to the land; the order concerned a *plan* of the city as to streets—distinct matters.

Here, again, referring to the subsequent statute of 1858, we see that,—regarding this order as only *ultra vires*,—the Legislature in the same act ratified it, likewise.

And this raises THE QUESTION IN THE CASE, viz: as to what *effect* this statutory ratification of the order had, or could have, upon Hoadley's title.

Our position is simply—that it had *no effect;* that the city's act, selecting these lands for squares, was wholly void, and that the statute could not cure it; because the statute could, no more than the order, destroy a valid title vested by the confirmed grant.

The decision of our Supreme Court herein is:

"The survey and map of these squares * * * was approved, ratified and confirmed by the Act of the 11th of March, 1858, and from such approval the survey and map above mentioned acquired validity." (Trans., p. 44.)

There is nothing in this decision and no law in this State to question the conclusion that the Ordinance 822 was *in presenti*—or that, through its subsequent ratification, it took effect as *of its date*, subject only to the performance of the condition subsequent. There is a distinct and undisputed finding that the condition subsequent was not performed.

Hence it follows, that here was a vested title—vested by the grant which was a contract with the possessors.

But the Supreme Court say *we have no title*—not that we *got* no title, but that we *have no title*, because the map of these squares was ratified by statute.

Truly it follows, then, that the obligation of the contract of grant is impaired by the statute of this State—which the Court has decided to be valid.

Here is the Federal question.

Thus far, in relating the series of acts as they occurred, we have, in each case, referred to the subsequent statute which purported to ratify them all, and we have given each, in its order, the effect which the ratification ultimately gave

it. For since the old maxim, "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur,*" has always been adhered to in this State and never questioned, it must be conceded that the statutory ratification related back and gave effect to each ordinance respectively as of and from its date.

In this view, we see that the *statute,* when it said in Section 2—"That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the city's interest and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey"—it ratified the grant as of June 20, 1855.

These are pretty strong words of ratification. They ratify Ordinance 822 to invest Hoadley with all the title which said ordinance "*purported*" to convey. It purported to convey the title to Hoadley *in presenti;* therefore, through the ratification, *it did* convey to him the title *in presenti—then.*

True, the condition subsequent was also confirmed, but confirmed in its then existing nature, as a condition subsequent—and being so established at that date, the condition unperformed—after six months, lapsed.

The title had been conveyed to Hoadley; was never taken back—has never been deeded back. Therefore, it *now* is in Hoadley and is founded on the grant, which is a contract.

The decision here, decides a part of the statute to be valid which impairs the obligation of the contract by destroying the estate.

Hence this writ of error.

We are aware that in presenting a "Federal question" to this Court, it must be shown to be a question which was necessarily involved in the decision—which necessarily

arose from the case itself, and that the Court could not have given a judgment in the case upon its merits without deciding that it involved a question of conflict with the Constitution of the United States.

All these things *exist* in this case.

The Federal question was not specially set out in the pleadings at *nisi prius*, but that is not required; for if there is any one thing which need not be pleaded it is the Constitution of the United States.

Such steps as these are unnecessary, because in entering this litigation we invoked the State statute and depended upon it. Of course we saw that the statute consisted of two parts: one giving and the other purporting to take away; and to us it seemed that the latter part was so repugnant and inconsistent with the first—the title being vested—as to be inoperative and nugatory; therefore we assumed that the Court would regard the statute in that part as simply ineffective, and sustain the grant. It would have been absurd to anticipate that the Court would decide a part of the statute valid which violates the Constitution of the United States.

But, when the Supreme Court decided such repugnant portion to be valid and effective—when the granting clause was overlooked, and the vested title swept away by the adjudged validity of the selection, then we were compelled to look upon that portion of the statute, the force of which had been declared; then and not till then did the question rise, as to what effect this so-called valid statute had upon the prior vested title.

But though we could not be expected to presume that the Court would sweep away a grant, or commit an act of injustice and wrong, yet all the facts establishing our status, and all the facts which go to make the case are found within the record.

The pleadings and the findings of fact—all in our favor—the exhibits and the statement on motion for a new trial, all show the matters which made the grant and matured the title—all show the executed contract which vested the estate,

and opposed to this, they show the repugnant words of the State statute going to destroy that title.

The decision itself of which we now complain, is the thing which first gave this repugnant part its force, and that alone matured the federal question and drove us to dependence on the Federal Constitution.

So we say, that viewed in the light of the decision "this question was necessarily involved in the decision, and necessarily arose from the case itself," because the facts establishing the vested title being on the record, before the Court, the contract being then exhibited, and the repugnant feature of the statute going to destroy that title; the question necessarily resulted to the Court whether or not the obligations of the contract *could be* thus impaired.

And further, "the Court *could* not have given a decision in the case without deciding that it impaired the obligation of the contract," because if they had decided in our favor it would have been *because* of such repugnancy; while the decision as they *did* decide displayed the statute in the shape of which we now complain.

We appreciate in full, the force and wisdom of that rule of law which guides this Court in its dealings with the decisions of State tribunals, and prevents it, where a rule of property has been once settled in the State, from again disturbing such rule.

But in this case instead of running counter to this rule we *depend upon* it.

For each of the legal propositions which combine to make our case, is firmly settled in this State, and all together form the rules of property for years adhered to before the judgment was announced herein.

If each step is true the conclusion must be true, and if the conclusion is true our position is established and our title made out: then it inevitably follows that our rights under the contract have been impaired.

Each step we say is strongly supported by all the prior adjudications in this State and by the principles of law.

For instance:

That Ordinance 822 was in terms a present grant, and purported to divest the city of the title *then*, cannot be disputed because it appears so on its face.

That Ordinance 845 purported to confirm the first, also appears in words unqualified.

That the condition reserved in Ordinance 822 whereby the city might get back the title to squares, was a *condition subsequent*, is a necessary conclusion from the well known rules of common law.

And that such condition subsequent was to be performed, if at all, by the *grantor*, is seen from the words of the ordinance.

That such condition subsequent must be strictly performed, and within the exact time and mode limited, because it goes to destroy estates, is another rule of the common law, which it would be folly to impugn.

And that where the condition subsequent is *unperformed*, it lapses and is lost, is also undisputed.

That this estate, when freed from the condition subsequent was left a perfect title, is also beyond controversy.

That the statute operates on the ordinances by relation has been constantly adjudged, as we have shown in our former brief, and from this we are entitled to assume that Ordinance 822 was given validity at its date, and *then* effected to accomplish just what it purported to do—namely, to divest the city of the title and to vest it in this plaintiff.

Ordinance 845 was made to do what it purported, namely: to confirm the grant.

That this statutory grant was in its nature a contract with the possessors, is likewise uniformly held.

Not one of these propositions is open to dispute and not one has ever been denied.

On the contrary, *each* stands *supported* by all the adjudications of this State and of the sister States, and of the Federal Courts and of the Courts of England, and by the principles of law. [For this, see authorities cited in our former brief, pp. 11–14, which we deem sufficient.]

We do *not* run counter to the rules of property established in this State; but instead, we call for the protection of

those rules as they have *been* established; and it is *because* those rules have been ignored and violated in this case, that we are here imploring the protection of this Court.

The decision complained of further says (Trans., p. 44)

"We find in the case *no trace of a contract* between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein"—that is, no rights whatever.

All the facts being in the record, whether this denial of the contract be true or false, depends on the construction to be given the laws of the State which are claimed as proving the making of the contract and its violation. If so, this Court decides for itself whether the construction which the Court below gave to these different statutes was correct or incorrect; and this Court is required to reverse, under the twenty-fifth section of the Judiciary Act, if it is found that under an error of construction the State Court has adjudged that no contract has been impaired.

Furman v. *Nichol*, 8 Wall., 58;
Louisville, etc., R. R. v. *Palmes*, 109 U. S., 256;

It follows then—

That the validity of this repugnant statute is drawn in question as the essence of the case. If it stands we fall.

That such statute effects to destroy our title and to impair the obligation of a contract.

That the Supreme Court of this State has decided in favor of its validity.

Therein the Federal Constitution has been violated. And under the Judiciary Act we are entitled to relief.

Respectfully submitted.

S. W. HOLLADAY,
Atty for Plaintiff in Error.

San Francisco, September 28, 1887.

Service of a copy of the within Reply Brief, is hereby acknowledged this 29th day of September 1887

Thomas H Johnson
Special attorney for
The defendant in
Error.

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Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

R. K. DOW, WATSON MATTHEWS AND CHARLES MORAN, AS TRUSTEES, Appellants,
vs.
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY—AS REORGANIZED, Appellee.

No. 1184.

On the appeal of the above-named appellants as trustees of a certain mortgage executed by appellee on May 2, 1877, from an order of the Circuit Court of the United States for the Eastern District of Arkansas, made in the case of the appellants herein against this appellee, awarding and ordering the restitution of certain moneys taken from appellee and in possession of the court.

R. C. BROWN,
FOR APPELLEE.

Gazette Printing Company.

IN THE

Supreme Court of the United States.

R. K. Dow, Watson Matthews and Charles Moran, as Trustees, Appellants,
vs.
The Memphis & Little Rock Railroad Company—as Reorganized, Appellee.

No. 1184.

On the appeal of the above-named appellants as trustees of a certain mortgage executed by appellee on May 2, 1877, from an order of the Circuit Court of the United States for the Eastern District of Arkansas, made in the case of the appellants herein against this appellee, awarding and ordering the restitution of certain moneys taken from appellee and in possession of the court.

Comes the above-named appellee, the Memphis & Little Rock Railroad Company, as reorganized, and moves the court to dismiss the appeal of the appellants above named from the order mentioned in the caption hereof (which appeal was taken as a cross-appeal in the cause numbered 1129 on the docket of this court) because the appellants had no interest in the matter of said order and no right to appeal therefrom, and because

their said appeal gives this court no jurisdiction, and because the matter so ordered was a matter within the discretion of the court below, from which no appeal lay.

Or, to affirm the order of the court below, because it is manifest that the appeal was taken for delay only, and because all questions involved have long been adjudicated and settled by this court, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

In the cause in which the order appealed from was entered the complainants below and appellants here sued as trustees of a mortgage executed by defendant on May 2, 1877, to secure payment of bonds that day issued.

The granting clause of said mortgage conveyed—

"All and singular the railroad and rights of way, from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden and State of Arkansas, to Little Rock, in the county of Pulaski and State of Arkansas, with the connections of said railroad with the Cairo and Fulton Railroad and the Little Rock and Fort Smith Railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railroad company, and all rails, trestles, ties, tracks, side-tracks, switches, depots, stations, buildings, water-tanks, machine-shops, car-houses, engine-houses, warehouses, work-shops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies and equipments which said railroad company, party of the first part, now owns or may hereafter acquire, or become entitled to in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main

line of said road from Memphis to Little Rock; and also all and singular all lands, real estate, property of every kind, real, personal or mixed, books of account, records, muniments and evidences of title and choses in action, which are now owned or may hereafter be acquired by said railroad company, party of the first part; and also the charters, franchises, rights, privileges and immunities, including the right or franchise to be a corporation, which the said railroad company now own or possess, or may hereafter own or acquire in the States of Arkansas and Tennessee, or elsewhere; *and also all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits and advantages had, received or derived by the said railroad company from its railroad or other property, or in any other way whatsoever:*"

By a subsequent clause it was provided.

"Fifth—In case default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, their successor or successors, and his or their survivor or survivors, on the written request of one-third, in interest, of the holders of said bonds, by themselves or by their agent thereto duly authorized, either of said trustees being competent to act as the agent of the other trustees, upon being furnished with funds for expenses and being suitably indemnified against risk and loss, may and shall enter in and upon, and take possession of and operate all and singular the said railroad and all other property, real, personal or mixed, hereinbefore conveyed, or intended to be conveyed, and take and receive the income and profits thereof; and may and shall sell all and singular said railroad and lands and all other property, real, personal or mixed, with all the charters, rights, privileges, immunities, franchises, and choses in action of said railroad company, party of the first part, hereinbefore conveyed, or intended to be conveyed, and execute and deliver to the purchaser or purchasers, deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title and interest, whether legal or equitable, of said party of the

second part, and of said railroad company, party of the first part, in fee simple, absolute, free of equity, or redemption of, in or to said railroad lands, property, charters, rights, privileges, immunities and franchises, and every part and parcel thereof, and said deeds and conveyances shall forever bar and estop said railroad company, party of the first part."

And said deed also contained this provision:

"That so long as the said party of the first part shall not make default in the payment of either principal or interest on any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part *shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof.*"

Default having been made in payment of interest, on February 12, 1884, appellees, as trustees, filed their bill, not praying foreclosure, but only that the conveyed property be delivered into their possession as trustees, or that a receiver be appointed.

On April 7, 1884, the court, by interlocutory order, appointed a receiver. The order directed the receiver to take, and required the defendant to deliver to him all the conveyed property, and *also all moneys of defendant then in its treasury.*

Before the receiver qualified, defendant, appellee here, moved the court to strike from the order all words which authorized the receiver to take, and all which required the defendant to deliver the moneys in its treasury to the receiver, alleging that all such moneys were derived by use of the conveyed property. This allegation was admitted by complainant to be true.

Desiring time for consideration of the matter the court made the following order:

"On this day came plaintiffs by U. M. & G. B. Rose, their counsel, and defendants by B. C. Brown, its counsel, and the court not being sufficiently advised as to what judgment to render upon the motion of defendant to modify the order heretofore made in this cause appointing a receiver, by striking therefrom all words which authorize the receiver to take, or require the defendant to deliver, the moneys in its possession derived from the operation of the mortgaged property, doth take the same under advisement, and it is ordered that defendant deliver said moneys to the receiver, to be held by him subject to the order of the court, and to be repaid to the defendant should the court so adjudge."

Afterward, being fully advised, the court held that this money had been wrongfully taken and ordered its receiver to refund it to defendant.

From this order of restitution complainants appealed to this court and were allowed to supersede the order and thus suspend restitution.

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1. No appeal laid, or could, properly have been taken from this order.

Not simply because it was an interlocutory order, but because it was an act of restitution on part of the court—the correction of a wrong done by the court.

The time to have adjudicated whether this money should or should not be taken was before it was taken. Courts can not be too cautious in exercising this delicate power.

There was no need of haste. The action of defendant in bringing the matter to the attention of the court, by its motion to correct the order which had been entered, showed that there was no intention to remove the fund out of the jurisdiction, or to evade the ultimate decision.

If the matter had been heard and adjudicated, the money would not have been taken. It would have remained where it belonged, with defendant, and no appeal by complainants could have taken any part of it from defendant.

Without necessity the court acted hastily, took defendant's money into its own keeping, to be held until it decided whether it should or should not take it, and to be restored if taken wrongfully.

After consideration the court became satisfied that it had acted wrongfully; determined that as far as possible it would right the wrong; that it would make restitution. It entered its order directing its officer—its hand—to restore the money, and then, strange to say, allowed appellants, by appeal and supersedeas, to prevent it from righting its own wrong.

Clearly this was a matter for the court itself and one from which the complainants below had no rights of appeal.

2. The order of restitution stands on no higher ground than an order awarding a writ of restitution, and it is well settled that from such order neither appeal nor writ of error lies.

Lessee of Smith v. Trabue's Heirs, 9 Peters, 4.

Gregg v. Forsyth, 2 Wall, 56.

Barton v. Forsyth, 5 id., 190.

If there is any difference it should be in favor of the im-

mediate execution of an order by which the court restores that which itself wrongfully seized.

The case nearest analogous to this which I can find is

Mail Company v. Flanders, 12 Wall, 132.

In that case the court without jurisdiction took into its possession property in possession of an agent. Upon its error being shown it restored the property *to the person from whom it was taken.* The complainant appealed, but the appeal *was not allowed to delay restitution,* and this court fully approved the action of the court below.

In our case all that was before the court was the title of the complainants given by the deed of mortgage. If, as the court afterwards found, that title did not extend to the money taken, the taking was wrongful and without jurisdiction.

The jurisdiction arose from the contract sought to be enforced and extended no farther than that contract. The fact that the court had power to take it gave it no jurisdiction.

The only difference there is between the two cases is that in our case the court allowed restitution to be delayed by the appeal of parties not interested.

3. But even if the appeal gave this court jurisdiction the order appealed from should be affirmed and its prompt execution directed.

Complainants, as trustees of the mortgage, had no title to or interest in this fund.

It is well settled that where mortgagee allows mortgagor to remain in possession after default, the latter takes the rents and profits to his own use, and mortgagee cannot require him to account for them, nor recover them from him.

The fact that the mortgage conveys the income, no matter how many or what words are used to describe that income, does not change the rule. Until the mortgagee takes possession, by himself or receiver, the income belongs to the mortgagor.

Galveston R. R. Co. v. Cowdrey, 11 Wall, 459.

Gilman v. Ill. & Miss. Tel. Co., 91 W. S., 615.

American Bridge Co. v. Heidelbach, 94 Id., 798.

These cases are all in point and expressed nothing but what had long been settled.

"In the case of a mortgage, where a mortgagee is left in possession, upon a bill brought by a mortgagee for an account in this court, he never can have a decree for an account of rents and profits for the mortgagor, for any of the years back during the possession of the mortgagor."

Lord Chancellor Hardwicke, in Higgins v. York Building Company (A. D. 1740), 2 Atkyns, 107.

"If a person have a mortgage title, this court will let him take possession of the estate, but will not make the party he leaves in possession accountable for past rents.

Lord Hardwicke, in Mead v. Lord Orrery, 3 Atk., 244.

"As to the mortgagor, I do not know any instance where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get possession."

Lord Chancellor Loughborough, in Colman v. Duke of St. Albans, 3 Vesey, Jr., 25, 32.

And this court:

"The land was in reality his own (the mortgagor), subject only to the lien; so much his own that he is not accountable to the mortgagee for the rents and profits received by him during

the continuance of his possession, even although the land when sold should be insufficient to pay the debt."

Hughes v. Edwards, 9 Wheat, page 500.

Also, Wilder v. Houghton, 1 Pick., 37; Boston Bank v. Reid, 8 Pick., 461; Mayo v. Fletcher, 14 Pick., 525, 533; Field v. Swan, 10 Metc., 112, 115; Chase v. Palmer, 25 Maine, 342, 346; Lang v. Wade, 70 Maine, 358; Noyes v. Rich, 52 Maine, 115; Jones on Mortgages, Sections 670, 771; Washburne on Real Property, Vol. 2, page 156, par. 11.

In argument below counsel for appellees made several futile attempts to evade the effect of these authorities, or to escape their application to this case.

First they sought to evade the cases in 91 and 94, V. S., by showing that they were contests between the trustees and a junior judgment creditor, and by attempting to limit them to such contests.

An all-sufficient answer to this is, that the court, in each case, worked out the right of the creditor through the right of the mortgagor, and the absolute want of title in the trustees.

In the Gilman case the words are:

"In this condition of things the whole fund BELONGED TO THE COMPANY."

In the Heidelbach case, until entry or receiver appointed:

"*The mortgagor is owner to all the world, and entitled to all the profits made.*

"The bill of the trustees is as ineffectual as if the funds were any other property, real, personal or mixed, acquired by the mortgagor *aliunde*, and never within the scope of the mortgage."

Another sufficient answer to this criticism is that it can be applied to neither *Galveston R. R. v. Cowdrey, 11 Wallace, 459,* nor to *Noyes v. Rich, 52 Maine, 115.* In these cases the contest was directly between the mortgagor, or one standing in his shoes, and the mortgagee.

The case of *Noyes v. Rich* is precisely in point.

At suit of trustees of a mortgage executed by the York and Cumberland Railroad Company, the plaintiff had been appointed receiver and ordered to take the mortgaged property into possession. The defendant at the time was superintendent of the railroad, and had money in his hands "which had accrued by operating the railroad." This he refused to deliver to the receiver, and this action was brought *by the receiver* to recover it.

Held, he could not succeed.

Per Curiam: "The suit of Mason and others (in which the receiver was appointed, reported page 83 of same volume), is not a general creditor's bill, though analagous to one. They bring it not in behalf of all the creditors of the corporation, but in behalf of certain specified creditors. Nor does it seek to reach all the property of the corporation, but certain specified property, mortgaged in trust for their benefit by a deed to Myers, dated May 6, 1861. The right of the plaintiff cannot extend beyond the property mortgaged; *and the right of the receiver must necessarily have the same limitation.* * * * It will hardly be contended that while mortgagors remain in possession they can be compelled to pay the rents and profits of the property to the mortgagees. And yet that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage until it was done by the receiver in March, 1860.

"The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject matter of the suit in equity, and the receiver was not entitled to it."

Our whole case was for specific performance of a contract. That contract gave the complainants no right or title to the money of the defendant. It follows, "as the night follows the day," that, misconceiving the law, the court took defendant's money wrongfully, and that it should have allowed nothing to prevent restitution.

Next, appellants contended that the case differed from those cited, because in this case, in the words conveying "income," the word "moneys" was used; and that because of this word, complainants, as trustees, were entitled to demand profits derived by defendants before possession was taken by the mortgagees. The argument hardly deserves answer.

The words of the mortgage are: "Income rents, issues, tolls, profits, receipts, moneys, rights, benefits and advantages."

In Gilman v. The Telegraph Company, they were, "all rents, issues, income, tolls, profits, *currency*, *moneys*, rights, benefits, and advantages." (Foot of page 604.)

"Income" is the generic word. All the rest are merely descriptive of species of income, and "moneys" is but the wand with which "income" in all its species or forms is measured. Excluding the last three words, (rights, benefits and advantages, which are not in issue here), each species of income mentioned could only be received in and measured by "money." In every case above the "income" in controversy was on hand in the shape of "money."

"INCOME—Gain derived from any business or property; profit; revenue."

The next attempt at evasion was based upon action had upon a previous day. On March 27, the argument upon the

motion for receiver being pending, the court continued it until the 7th of April, to allow briefs to be filed. Its order was:

"On this day came the plaintiff, by U. M. & G. B. Rose, their solicitors, and also came said defendant, by B. C. Brown, its solicitor, and it is now ordered that both parties have leave until the 7th day of April next to file printed briefs on the motion for the appointment of a receiver herein; and it is further ordered that the defendant herein hold the *property* mentioned in the bill herein, *subject to the order of the court;* and defendant has leave to plead, answer, or demur to the bills of complaint herein on said 7th day of April."

No order was made until the 7th of April. On that day a receiver was appointed, but he did not qualify until April 11th. It was contended that by this order the directors of the company became the receivers of the court, and, of course, that it was upon that day that the money was seized by the court.

That this matter may be fully understood, I quote from the brief filed below, on behalf of plaintiffs, upon this motion:

"A reference to the matter will disclose the fact that on the 27th day of March, the defendant had on hand $42,123.68.

"After that and prior to April 11th, the day when the receiver was actually appointed, *the defendant had paid out on vouchers for the month of March,* $46,458.16. The amount of money turned over to the receiver was $32,216.20. Thus, it will be seen that the money turned over, and which the company now seeks to regain, was acquired after the property had been taken into the hands of the court, where it was safe for the trustees, not only as against the defendant, but even against any outside claimants, if any such there be."

The value of this notion will be seen when it is considered:

1. That nowhere in the bill is there any prayer that defendant's moneys on hand be taken.

2. That the order says nothing of receivers, or of money, but only requires defendant to hold the "property," that is the conveyed property, subject to its order.

3. That the court had no more power to take defendant's money on one day than the other, or by one receiver than another.

If the contention that the court seized defendant's money on hand on March 27th, is correct, then we might ask to amend our motion, and that the court restore the $42,000 then on hand, instead of the $32,000 on hand when the receiver took possession.

But it is clearly incorrect. In no sense were defendant's directors receivers. And no money of defendant was taken until April 11th. It is this money the court determined to restore, and it is this that it should have restored.

Moneys acquired after the beginning of the suit, even after sale was ordered, and until possession actually taken, do not pass by the mortgage.

Referring once more to the statement of counsel above quoted, I ask could anything more perfectly show the perfect fairness of the defendant? It could have appropriated the whole amount of money in its hands on the 27th day of March, and all moneys received up to the day of the appointment of the receiver (in the whole over $70,000), to any use it pleased, or converted it to its own use. It could have left all the vouchers for the month of March, amounting, as shown, to over $46,000, for the court and its receiver to pay. Instead of doing that it paid all its employes, and left itself without claim, but for the $32,000 left, and which was taken from it by order of the court.

The last attempt at evasion is shown by another quotation from complainant's brief below.

"In view of the motion of the defendant for the restoration of the money paid to the receiver, several creditors have filed claims of intervention, showing that they have recovered judgment against defendant upon which they have had execution issued, and that the marshal has returned that all the property of the defendant is in the hands of the receiver appointed by this court.

"If the court should be of the opinion that the money in question should not be left in the hands of the receiver, we ask for a direction that it shall be applied to the payment of these judgments."

The modesty of this request is its chief, I might say its only, feature. It amounts to saying:

"The court, at our request, has seized that to which we have no claim. If the court will not give it to us, then please give it to some other person who has no more lawful claim than we have."

"The court has wrongfully seized defendant's money. Don't restore it. Rather let the court make itself a collection agent; one which seizes without jurisdiction and distributes without right."

It is respectfully submitted that the appeal should be dismissed or that the order appealed from should be affirmed.

B. C. BROWN,

For Appellee.

John F. Dillon